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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 99

THE CINCINNATI GAS & ELECTRIC COMPANY AND THE CITY OF CINCINNATI,

Petitioners,

against

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDICES

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
The Questions	2
The Statutes	2
Statement of the Case	3
Argument	6
Though the Commission Promised to Objectively Compare the Benefits and the Harm, It Did Not Do So. If It Had, It Would Have Found the Net Harm from the Texas Gas Supplies to Be Some $2 Million—and Ruled for CG&E Rather than Hamilton	6
The $12,002	12
Ohio Commission Jurisdiction	13
Growth Elsewhere Will Not Mitigate the Harm	14
Rates to Customers	14
CG&E Is No Middleman	15
The Harm to CG&E's Suppliers Would Come to $1.7 Million	16
Conclusion	17
Appendix A	19
Appendix B	30

CASES

Alabama-Tennessee Natural Gas Co. FPC Opinion No. 534, Docket Nos. CP 66-336 and 67-62 (1967)	10
Atlantic Refining Co. v. P.S.C., 360 U.S. 378 (1959)	6
Home Gas Co. v. F.P.C., 231 F. 2d 253 (1956)	11

PAGE

Kentucky Natural Gas Corp. v. F.P.C., 159 Fed. 2d 215 (1947) 11

Lynchburg Gas Co. v. F.P.C., 336 F. 2d 942 (1964) . 5, 8

New England Power Co. v. F.P.C., 349 F. 2d 258 8

Panhandle Eastern Pipeline Co. v. F.P.C., 219 F. 2d 729 (1955) 11

Shrewsbury Municipal Light Dept. v. New England Power Co., 32 FPC 373 (1964) 8

State ex rel Hamilton v. Public Util. Comm'n, 10 Ohio St. 2d 172 (1967) 14

United States v. El Paso Natural Gas Co., 376 U.S. 651 (1965) 11

STATUTES

Natural Gas Act, Sec. 4(b) (15 U.S.C. § 717c(b)) .. 3

Sec. 7(a) (15 U.S.C. § 717f, 52 Stat. 833) 2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners respectfully ask that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on February 16, 1968 in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 389 F. 2d 272 (1968). The opinion, together with the Court's judgment, is reproduced at the back of this Petition as Appendix A.

The opinion and order of the Federal Power Commission are reported at 37 FPC 209 and are reproduced as Appendix B to this Petition. The FPC Order Denying Re-

hearing is reported at 37 FPC 598 and printed at pages 538-42 (R. 2665-9) of the Joint Appendix (Vol. II). The FPC Presiding Examiner's decision is reported at 37 FPC 221 and is reproduced as part of Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals is dated and was entered on February 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

THE QUESTIONS

In deciding that an existing gas supplier should be displaced by a lower cost one, can the Federal Power Commission justify the displacement by finding an economic benefit to the consumers immediately involved—without going on to weigh, on the same basis, the resulting economic harm to the other customers served by the existing supplier?

or, more generally,

May FPC allocate the benefits of a low cost supply to one group of consumers in an area at the expense—and then some—of the balance of the consumers in the area?

THE STATUTES

Section 7(a) of the Natural Gas Act (15 U.S.C. § 717f, 52 Stat. 833) provides:

> "Whenever the Commission . . . finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend . . . its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged . . . in the local distribution of natural . . . gas to the public."

Section 4(b) of the Act (15 U.S.C. § 717c(b)) provides:

> "No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

STATEMENT OF THE CASE

For some years, petitioner, The Cincinnati Gas & Electric Company, has served the natural gas needs of the City of Hamilton at wholesale. The City has resold the supply to its citizens through its own gas distribution system. The proceeding began when Hamilton applied to the Federal Power Commission for authority to obtain its supply from a nearby pipeline, Texas Gas Transmission Corporation, rather than CG&E. The presiding examiner authorized the new supply on the basis that its advantage to Hamilton and its consumers outweighed any disadvantages to CG&E and its suppliers. He evaluated the advantage to Hamilton by determining the effect the new supply would have on its revenues and expenses—specifically, that a Texas Gas supply would effect 10 year savings to Hamilton of some $1.2 million (or possibly $1.9 million) and, over the 10 year period, would probably result in an increase of its off-peak sales and therefore revenues by some $1 million on account of the Texas Gas commodity (or off peak) rate being lower than CG&E's (Jt. App. 514-5, R. 2395-6). After the record was closed, Texas Gas reduced its rates by some $.8 million so far as Hamilton is concerned.

The Commission totaled the 10 year benefits at $2 million ($1.2 + $.8 = $2 million):

"The evidence conclusively establishes that Hamilton and its customers will obtain significant economic benefits from the change in suppliers. First, there are substantial monetary savings and additional increases in net revenue which Hamilton can reasonably be expected to realize in the first ten years of service from Texas Gas. These direct dollar savings consist of (1) $1 million in lower gas purchase costs; (2) $900,000 from the operation of Texas Gas' 90 percent minimum demand payment provision; and (3) an additional $800,000 from the recent reduction in Texas Gas' demand charge. . . . In addition, Hamilton has shown that with the lower cost commodity charge of Texas Gas it will be able to make increased industrial sales, not possible under the Cincinnati Gas rate, which will increase its profits by approximately $100,000 per year, or $1 million over the first ten years of service.

"There may be some question as to whether all of the foregoing benefits will in fact be realized to the complete extent described. There is no question, however, but that Hamilton will realize minimum savings of $2 million over the ten year period. Cincinnati Gas conceded that Hamilton will realize savings of $1.2 million and this computation did not include the additional $800,000 which would result from the reduction in Texas Gas' demand charge."

Pages 3 and 4 of Opinion No. 513, Jt. App. 528-9, R. 2618-9

Thus, the FPC measured the benefits to Hamilton by determining the effect on its revenues and expenses of substituting the new supply for the old.

CG&E submitted a showing of resulting detriment on the same revenue and expense basis, claiming that the detriment from the loss of the Hamilton sale would outweigh the benefits to Hamilton. The detriment was arrived at by netting the loss of revenues and the reduction of expenses on account of the loss of the Hamilton load.

However, the Examiner and the Commission refused to use the revenue and expense rule in measuring the harm. Instead, FPC found that CG&E wasn't making very much money out of the Hamilton sale (CG&E had reduced its rate to meet competition) and primarily that the Hamilton sale was small enough that CG&E's growth would soon "replace" the loss:

> ". . . we begin with the basic premise that *Lynchburg* . . . established the test for evaluating the nature and scope of injury to be sustained by the loss of a particular load. The rule of *Lynchburg*, as we interpret that decision, makes it clear that no useful purpose is served by discussing in general terms, a loss in revenues or a simple reduction in rate of growth unless these circumstances are translated, by a proper showing, into proof of substantial actual detriment to the customers of Cincinnati Gas or Ohio Fuel. It is only this latter showing of detriment which can then be weighed in the balance against the established advantages to Hamilton's consumers in determining the overall public interest. . . .
>
> "The evidence is clear that Cincinnati Gas' loss of the Hamilton market will shortly be offset by an increase in Cincinnati Gas' other sales. . . ."
>
> Pages 5 and 7 of Opinion No. 513, Jt. App. 530 and 532, R. 2620 and 2622.

The *Lynchburg* decision referred to in the quotation is *Lynchburg Gas Co.* v. *F.P.C.*, 336 F. 2d 942 (D.C. Circuit, 1964).

Without discussing the Commission's lack of consistency, the Sixth Circuit affirmed the Commission.

ARGUMENT

Though the Commission Promised to Objectively Compare the Benefits and the Harm, It Did Not Do So. If It Had, It Would Have Found the Net Harm from the Texas Gas Supplies to Be Some $2 Million—and Ruled for CG&E Rather Than Hamilton.

> "The Act was . . . framed . . . to afford consumers a complete permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co.* v. *PSC*, 360 U.S. 378 at 388 (1959).

The Commission and the Court of Appeals have religiously followed the *Atlantic Refining* mandate so far as the Hamilton consumers are concerned. If they were the only consumers involved, the decision would be correct—for they will be truly benefited by the new supply. But they are not the only consumers. The lot of the consumers who will continue to be served by the "pioneer" suppliers is also involved. How will a change in suppliers affect them? Certainly the Natural Gas Act accords no preference to any particular set of consumers. Within the circumstances of economic proximity to supply they are all to be treated fairly.

The Commission indeed promised such consideration to the second set of consumers. It said it would weigh the benefits of the new supply against the harm, with the preponderating side winning:

> "It is also incumbent upon the Commission in any evaluation of a proposal such as this to consider whether such economic advantages would tend to be outweighed by economic disadvantages to the customers of Cincinnati Gas or Ohio Fuel by the withdrawal of the Hamilton load."
>
> Page 5 of Opinion No. 513, Jt. App. 530, R. 2620.

Under such a rationale, the case is decided when the definition for measuring the benefits and harm is chosen. First

of all, it seems obvious that the same definition must be used for one as for the other. One cannot objectively "weigh" or compare things unless they are put on the same standard. And the Commission promised to compare the two. The Natural Gas Act in its protection of the overall public good surely requires that the same norm be used to measure both the benefits and harm. Second, since the quality and type of service provided to both sets of consumers is the same, the differentiation has to be in terms of cost. Third, in terms of systems serving consumers, the cost differentiation is arrived at by consideration of the revenues and expenses of the systems (While Hamilton would experience an increase in plant, and therefore rate base, under the Texas Gas proposal, the additional resultant annual costs were subtracted from the revenue and expense benefits otherwise accruing to it to arrive at net revenue and expense benefit, Ex. 43, p. 1, Joint Appendix p. 437 (R. 1026)). If sales do not change, an increase or decrease in expenses in a rate regulated industry effects a higher or lower rate to the consumer. An increase or decrease in sales, and therefore revenues, effects a lower or higher rate to the consumer since the total costs are divided by the number of sales units to determine the rate.

In determining the benefits to Hamilton and its consumers from the new supply, the Commission used the revenue and expense rule. It is the proper rule to use. Specifically, the benefits to Hamilton were arrived at by calculating Hamilton's expenses and revenues, on the assumption that Texas Gas supplies are substituted for CG&E supplies. The benefits are equal to the sum of (1) the reduction of expenses on account of the Texas Gas supply (the cost of supply when served by CG&E minus the cost of supply, including additional facility charges, when served by Texas Gas) and (2) the increase in revenues due to the additional industrial sales enabled by the low Texas Gas commodity rate (to the extent found likely).

But when it came to the harm, the Commission scorned the revenue and expense rule—notwithstanding that it had employed such consistency in a similar proceeding in the recent past:

> "The impact of our action on Massachusetts Electric (the existing supplier—our note) must of course be considered . . . the amount of loss here is very small. In 1962 Mass. Electric actual bill to Shrewsbury (the existing customer—our note) was $620,508. If Shrewsbury had not been a customer Mass. Electric's purchase power expense would be reduced by $540,830." *Shrewsbury Municipal Light Dept.* v. *New England Power Co.*, 32 FPC 373 at 377 (1964), affirmed sub nom *New England Power Co.* v. *FPC*, 349 F. 2d 258.

This is exactly the way CG&E determined the harm to its consumers, i.e. by aggregating the reduced revenues and expenses due to the loss of the Hamilton sales volume. However, instead of using the "revenue-expense impact" rule of *Shrewsbury* and the "Texas Gas" side of *City of Hamilton*, the Commission settled on the fact that, so far as CG&E's harm was concerned, the growth from its remaining customers would soon "replace" the Hamilton loss. In this, it followed *Lynchburg Gas Co.* v. *F.P.C.*, referred to on page 5 above. *Lynchburg* involved a distinctly different issue than the issue here. There, the supplier was seeking a tariff which would economically penalize its customers for unduly resorting to new sources of supply. The case did not involve an actual loss situation where benefits could be compared with harm. The difference between the two situations is illustrated by the fact that *Lynchburg* was a rate proceeding and *City of Hamilton* proceeding is a certificate one. It may well be satisfactory in a *rate* proceeding to

stop a supplier from precluding competition, even unfair competition: the Commission knows that it can later examine any actual competition when the facts come before it in a certificate proceeding. However, when the Commission gets to the certificate proceeding, it is not enough to quote *Lynchburg*, as *Hamilton* does, to the effect that the loss of one customer will be offset by the growth of other customers. Such a rule doesn't account for the actual impact of the loss, that is, the effect on revenues and expenses. If it happens that, as a result of a switch in suppliers, the improvement in the revenues and expenses of one side is greater than a deterioration on the same account in the revenues and expenses of the existing supplier, it may fairly be said there is a net gain to the consumers as a whole. But the converse is equally telling. Of course, there might be countervailing considerations—though none were present in the case below.

In other words, blind transposition of *Lynchburg* from its rate tariff setting to a certificate proceeding, where the actual benefits and harms are being evaluated, can be unjust. It was in this case. If the harm to CG&E, its consumers and its suppliers and their consumers were determined on the same basis as the benefits to Hamilton, the 10 year harm would come to $4.1 million as against minimum 10 year benefits of $2 million as found by the Commission (or $3.7 million if all of Hamilton's claims were accepted—which they were not), page 6 of Opinion No. 513, Jt. App. 531, R. 2621. To take from one to give to another is wrong.

That the Commission should be directed to follow such consistency in dealing with the two sets of customers is most appropriate at this juncture of the natural gas business. Until now, the Commission has been largely concerned with certificating undeveloped markets. When there was no competition for the market, the prospective

supplier had only to show that its gas service would be cheaper than the existing fuel. Where competitive supply applications have been involved, the lower cost supply has won. In neither case has the Commission concerned itself with the lot of the existing coal or oil suppliers. It was given no particular responsibility as to them. With gas, the Commission has complete responsibility.

Now that the markets are largely certificated*, the competition is for the growth of the existing markets or the taking over of the business of the existing supplier—the situation here. We do not argue that the existing supplier should be free of competition for its existing markets. Section 7(g) of the Act forbids that. But we do argue that the Commission may not overlook the plight of the existing supplier and its consumers and the Commission has professed to agree. By changing the rules in the middle of the case, it has reneged on the profession. It has effected a camouflaging of the harm: gas is a growth business and, under the FPC theory, every year will justify the loss of that part of a market equal to the growth in the balance of the market. While the "escaping" portion will be benefited, the remainder is really paying the price. This is not the progress the Act provides for. The Commission should be stopped while the damage is just starting. That *City of Hamilton* is the start of a trend, see the more recent "City of Corinth" case, FPC Opinion No. 534 in *Alabama-Tennessee Natural Gas Co.*, Docket Nos. CP66-336 and CP67-62, November 30, 1967.

The Commission's new policy is contrary to its almost universal past practice of protecting existing markets. For example:

> "(The new and competing supply is) . . . not in displacement of any part of its Panhandle allotment but

* Hamilton was once certificated to CG&E—Jt. App. 78, 445, R. 212A, 1185.

> over and above it in order to provide for the increased requirements of the . . . (customer's) territory." *Panhandle Eastern Pipeline Co.* v. *F.P.C.*, 219 F. 2d 729 at 731 (1955), cert. denied, 349 U.S. 945.
>
> and
>
> "In our order . . . we limited the services by (the new supplier) Tennessee to preclude any such injury to . . ." (the existing supplier). *Home Gas Co.* v. *F.P.C.*, 231 F. 2d 253 at 256 (1956)

The only result we know of to the contrary among the cases—until recently—is *Kentucky Natural Gas Corp.* v. *F.P.C.*, 159 F. 2d 215 (Sixth Circuit, 1947). And that was a case where the existing supplier made no evidentiary showing of harm, 159 F. 2d at 218.

Justice Douglas has described the situation well:

> "Once the Commission grants authorization to construct facilities or to transport gas in interstate commerce, once the distributing contracts are made, a particular market is withdrawn from competition. *The competition then is for the new increments of demand that may emerge with an expanding population and with an expanding industrial or household use of gas.*" *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 at 660 (1965).

Our appeal is for more liberality: if the switch provides a net benefit for all of the consumers involved, it should be permitted. It is no advantage to an area that its costs of gas supply are increased on an overall basis—even though one part of the area achieves a lower cost.

* * * * *

The Commission will respond with a number of arguments. But it is a safe prediction that a defense of the mid-case change of rule will not be advanced: neither the Commission, nor Hamilton, nor the Sixth Circuit has attempted that. It will be left to silently stand—because no

one wishes to defend the use of one rule for one side and another for the other.

The $12,002

The Commission responded to our harm case by citing the fact that, as a matter of rate development, CG&E was not making much money on the sale to Hamilton. The Sixth Circuit even claimed CG&E was losing money (page 6 of the Decision). They meant by this that, under CG&E's reduced rate, it would stand to make only some $12,002 a year over its out-of-pocket costs, or $148,000 short of its full cost of service (Jt. App. 531, R. 2621). But this effort to meet competition does not mean that CG&E's remaining customers would lose only the $12,002. The true impact on them can only be determined by the revenue and expense rule.

The technical reasons for the disparity between the $12,002 annual figure and the $2.4 million of 10 year harm are twofold (the $2.4 million is CG&E's portion of the total harm of $4.1, the balance of $1.7 million being the harm to the Ohio Fuel customer):

(1) due to the demand "ratchets," which are common in the natural gas business, CG&E will, for a period, have to pay demand charges for gas which it can't use—on account of the loss of Hamilton (Jt. App. 103, R. 243),

(2) the $12,002 is based on an average of purchase gas costs, whereas business is actually done on an incremental basis—any additional business is taken on at the cheapest possible cost and the retention of Hamilton would make it possible for CG&E to buy the additional requirements at a lower than average rate, known as the Winter Service rate (Jt. App. 330-1, R. 587-8; Ex. 25—Jt. App. 426, R. 939).

These are the factors that account for the great bulk of the $2.4 million of harm. The $12,002 does not begin to describe it.

In this connection, it should be worthwhile to point out that allowance or disallowance of special assignment of two low cost supplies in developing the rate to Hamilton has comparatively little to do with the $2.4 million of harm. In figuring the deterioration of its situation CG&E included the assignment of the Texas Gas supply both with and without Hamilton. Since it was included in both calculations, it is a wash and does not affect the result. If it were excluded, it would be excluded from the calculation with Hamilton as well as without. Again, it would be a wash and would not affect the dollars of difference. The additional Winter Service, which was the other assignment, accounts for only $.56 million of the $2.4 million of harm ($56,000 for the year 1968 times 10 equals $.56 million—Ex. 24, note B, Jt. App. 425-A, R. 935).

Ohio Commission Jurisdiction

The Commission and the Sixth Circuit took the position that for Hamilton to be left with CG&E will place it in a regulatory no-man's-land:

> "There is considerable doubt whether the Ohio Commission has any jurisdiction over the matter . . ." of CG&E's rates to Hamilton.
>
> Page 6 of Decision.

This conclusion is hardly warranted for it is necessarily based on the idea that jurisdiction does not exist because *Hamilton* is contesting it: the Ohio Commission has found jurisdiction (page 7 of the Examiner's Decision, Jt. App. 516, R. 2397) and Hamilton has appealed the finding. We are in the process of urging the Ohio Supreme Court to rule on this question—so as to remove any doubt about the result. Thus far that Court has not set the matter for final argument—no doubt because Hamilton has expressed a lack of interest in its appeal. Hamilton appears to be unwilling to risk an adverse Ohio Supreme Court ruling when it already has a Sixth Circuit finding that there is

"considerable doubt" as to Ohio Commission jurisdiction. We shall do everything in our power to get a decision on the appeal. If so, we shall submit the decision to this Court. Short of being able to do so, we can only state that the Sixth Circuit's basis for asserting "considerable doubt" as to Ohio Commission jurisdiction is completely erroneous. That basis was that the Ohio Court had already decided that the Ohio Commission had no jurisdiction over the rate to Hamilton, *State ex rel. Hamilton* v. *Public Util. Comm'n*, 10 Ohio St. 2d 172 (1967)—see footnote 5 on p. 7a of Appendix A. This is an incorrect description of the decision: it dealt with abandonment of service—not rates.

The Sixth Circuit noted that CG&E was unwilling to commit itself as to rate level beyond November 1, 1969 (page 6). There is nothing significant in this. When the rate is as close to cost as CG&E's reduced rate to Hamilton, one has to be careful about the future and its unknowns. CG&E could not in fairness to its other customers go beyond a short period. This is no hazard to Hamilton. The case shows Hamilton's extremely effective bargaining leverage. If CG&E were to break faith with its pre-November 1, 1969 rate, it would be discredited before the FPC and Hamilton could capitalize on the discredit simply by requesting FPC to authorize it a Texas Gas supply. The controversy would be short lived.

Although the Court noted that Hamilton could obtain a twenty year service agreement from Texas Gas (page 6), CG&E made the same arrangement available to Hamilton (Jt. App. 420, R. 929).

It is quite true that CG&E did not propose to give Hamilton a competitive advantage as to the sale of industrial gas—both would begin at the same starting line (Jt. App. 87-8, R. 222-3). But if a competitive disadvantage is to be abhorred, what about the competitive disadvantage to CG&E from certification of Texas Gas to Hamilton? FPC

has conferred a competitive advantage to the Hamilton area at the expense of the other area.

Growth elsewhere will not mitigate the harm

The Commission found that the Hamilton load would tend to be "replaced" by better load factor, more profitable sales to fast growing communities in the neighborhood of Hamilton. This is but a specification of the *Lynchburg* rationale, with which we have already dealt in principle (pages 8 and 9 of this Petition).

Rates to Customers

The Sixth Circuit noted that the Examiner and the Commission were in agreement that "the changeover would not require an increase in rates to CG&E's other customers" (Decision, page 7). This is only a way of stating that growth from the other customers would replace the Hamilton load. Since the costs and the sales, after "replacement", would remain the same, the rate could well be anticipated to remain the same. And the evidence on which the Examiner and the Commission relied was only this (Jt. App. 523, R. 2404). But if Hamilton were retained, the sales units would be increased and accordingly rates could be reduced. This is what CG&E is seeking for its customers and what the Commission's decision would deny it. It is a complete anomaly for the Commission to have done so—as the nod was given to Hamilton because a Texas Gas supply would enable it to *reduce* rates to its consumers. Surely, CG&E and its customers are entitled to the same consideration.

For some reason incomprehensible to us we have been unable to get this point across to anyone. Of all the decisions and briefs in the case, the Sixth Circuit made the only response to this point and then that retention of Hamilton would make "more money" for CG&E (Decision, page 7). This is not the point at all—which should be

attested by the fact that the City of Cincinnati, the initial regulator of CG&E's rates, has been an active advocate of CG&E's position throughout the proceedings, including this effort for certiorari. The effort is for the consumer and not the stockholder. There is no way that the stockholder, as distinguished from the consumer, can be made to bear the great bulk of the harm (as suggested at page 7 of the Decision): most of the harm is in purchased gas expense rather than rate base (Jt. App. 319, R. 574). Who can say that it was unnecessary to incur these expenses?

CG&E Is No Middleman

The Sixth Circuit characterizes CG&E as a middleman in the supply chain (page 8). CG&E may be a middleman, just as the producer and the pipeline may be, but it is certainly not an unnecessary middleman.

We would all buy from the factory but for the fact that there has to be a means of distributing the goods from the factory to the ultimate purchaser. This is a necessity—even where the "factory" is close at hand, as in the case of Hamilton in its proximity to Texas Gas. Cincinnati Gas performs this function for Hamilton. It receives the gas from its suppliers and, over the years, has developed a $1,000,000 system of lines to bring the supplies to the Hamilton city gates (Jt. App. 81-2, R. 214-5). Indeed, Hamilton itself would duplicate the most terminal of these facilities in order to get the supplies from Texas Gas to the city gates.

The Harm to CG&E's Suppliers Would Come to $1.7 Million

CG&E is served by subsidiaries of the Columbia Gas System. One of the subsidiaries, Ohio Fuel, asserted that loss of CG&E's Hamilton load would cost it $1.7 million over the ten year period, arrived at by its loss in fixed charge coverage through loss of its sales to CG&E on ac-

count of Hamilton (Jt. App. 516 (bottom of page), R. 2397). The Commission criticized this figure by asserting that Ohio Fuel would not experience the cutback to the full degree in the first year (page 7 of Opinion No. 513, Jt. App. 532, R. 2622). It is not fair to draw such a conclusion. The first year is a transition year. And to the extent that Ohio Fuel did not experience the loss, its sister subsidiary would. After the first year, the cutback on Ohio Fuel was estimated to build up very quickly: 3,000,000 out of a total of 4,848,468 Mcf (Ex. 25, page 2, line 8, subtract column 9 from column 4 and see line 14; Jt. App. 427, R. 940). CG&E's witness testified without contest that ". . . most of this impact (cutback) would in any event fall on Ohio Fuel" (Jt. App. 335, R. 593). Indeed, the Commission acknowledged as much in its decision:

> "We note . . . that Counsel for the companies admitted that, in the long run . . . the burden would fall completely on Ohio Fuel . . ." page 5 of Opinion No. 513, footnote 8, Jt. App. 530, R. 2620.

* * * * *

CONCLUSION

There is a considerable tendency by the Courts to accept the decisions of regulatory bodies on account of their specialization in the matters involved. Informed judgment should always be respected. But the tendency has gone too far and the check and balance function of the Courts is in process of almost total erosion. Between the extremes of complete regulatory discretion and complete judicial choice there lies an appropriate median: that the Courts insist the regulatory body give a rational explanation of its action.

That was not done here. The Commission measured the economic impact on Hamilton's revenues and expenses to determine its benefits but changed to another measure

when evaluating the harm to the other customers of CG&E and its suppliers. Since the issue was resolved completely on the basis of economic impact, the scales should have been the same for both sides—even as the Commission promised it would "weigh" the advantages against the disadvantages. The result is that the one set of consumers will be advantaged at the expense of the others.

It is important that this Court review this case because, contrary to the Commission's decision, one consumer is entitled to as much consideration as another, because, with the saturation of markets, this kind of case will become commonplace, and finally because in decisions subsequent to *City of Hamilton* the Commission is making a rote of the inconsistent and unwise rule of this case.

It is very much in the public interest that this petition should be granted.

Respectfully submitted,

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APPENDIX A

(Filed February 16, 1968)

Nos. 17888 & 17939

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 17-888

THE CINCINNATI GAS & ELECTRIC COMPANY, et al.,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent,

THE CITY OF HAMILTON, OHIO and TEXAS GAS TRANSMISSION CORP.,

Intervenors.

No. 17,939

THE OHIO FUEL GAS COMPANY, et al.,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

ON PETITIONS FOR REVIEW OF FINAL ORDERS OF THE FEDERAL POWER COMMISSION.

Decided February 16, 1968.

Before WEICK, Chief Judge, O'SULLIVAN and PHILLIPS, Circuit Judges.

WEICK, Chief Judge. These proceedings are to review orders of the Federal Power Commission authorizing the

City of Hamilton, Ohio, to change from its present natural gas supplier, The Cincinnati Gas & Electric Company (CG&E), to another supplier, Texas Gas Transmission Corporation (Texas), whose main transmission system passes within the city limits of Hamilton.

The basis for the orders was that Texas would supply the gas to Hamilton at a substantially lower rate than CG&E, and that the benefits derived by Hamilton from the change in suppliers outweighed, in the public interest, any adverse impact on CG&E, its customers and suppliers, occasioned by the loss of Hamilton as a customer.

The City of Hamilton from its municipally owned plant distributes gas to more than 20,000 customers in an area embracing approximately 79,000 people, located about twenty miles north of Cincinnati. Since 1937 it has obtained all of its supply of gas from CG&E, also a distributor, which in turn is supplied by The Ohio Fuel Gas Company (Ohio Fuel) and Kentucky Gas Transmission Corporation (KGT), both Columbia System Companies. The sale of gas by CG&E to Hamilton is not regulated by the Commission as CG&E was granted a "Hinshaw" exemption under Section 1(c) of the Natural Gas Act (15 U.S.C. § 717(c)) in 1955.[1] 14 F.P.C. 534. The sale of gas from CG&E to Hamilton was not regulated by the Public Utilities Commission of Ohio.

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[1] This section provides in pertinent part:

"The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission."

Appendix A

Hamilton's service contract with CG&E expired on September 3, 1966, but has been continued on an interim basis pending a resolution of the controversy.

Hamilton is CG&E's only wholesale customer, and constitutes 5% of its market, purchasing about 4,500,000 Mcf annually.

Hamilton investigated alternate sources of supply in order to obtain the most economical service available.

After giving notice to CG&E of termination of its contract, Hamilton negotiated a new twenty-year service contract with Texas, which would be subject to regulation by the Commission. Texas agreed to supply gas under its G-4 rate schedule, which had a demand charges of $2.71 per Mcf and 22.22¢ per Mcf commodity charge.[2] The demand charge was later reduced by order of the Commission to $2.53 per Mcf. At the termination of the contract CG&E's rate was $2.3249 demand and 35.5¢ per Mcf commodity charge.

CG&E made several offers during the course of the proceedings to reduce its rate. The last one for continuing service was $2.03 demand and 30.5¢ per Mcf commodity. Texas' 22.22¢ commodity charge was thus 13¢ below CG&E's contract rate and more than 8¢ per Mcf less than its best offered rate.

Hamilton filed an application with the Commission under Section 7(a)[3] of the Act for authority to purchase its gas

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[2] The volumes herein referred to are at 14.73 psia.

[3] Section 7(a), 15 U.S.C. § 717f(a) provides in part:

"... it [Commission] may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public ...."

supply from Texas, and Texas applied under Section 7(c)[4] for authority to construct necessary facilities and to sell and deliver the supply of gas sought by Hamilton. Ohio Fuel filed a competitive application to be considered only if CG&E was discontinued as the supplier. It proposed to buy gas from Texas to sell to Hamilton. Interventions were permitted. The applications were consolidated for hearing and were heard by the Presiding Examiner on the evidence, and he handed down his Initial Decision upon the consolidated applications granting a Certificate of Public Convenience and Necessity to Texas, authorizing the sale of gas to Hamilton, and the construction of necessary facilities. The application of Ohio Fuel was denied. The Commission in a written opinion reviewed the Examiner's decision and adopted it to the extent not inconsistent with its own opinion.

There is no dispute about the fact that the Texas proposal would provide Hamilton with the lowest gas rate. Indeed, it was actually lower than CG&E paid its own suppliers. The controversy before the Commission centered on the extent of the benefits which would be derived by Hamilton under the Texas proposal, and whether they were outweighed by the impact on CG&E and its customers and suppliers occasioned by the loss of Hamilton as a customer.

The examiner found savings to Hamilton of at least $1,242,976 over a ten-year period. In addition he found

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[4] Section 7(c), 15 U.S.C. § 717f(c) provides in part:

"No natural-gas company . . . shall engage in the transportation or sale of natural gas, . . . or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . ."

evidence that Texas' low commodity rate would enable Hamilton to make additional industrial sales of 1,500,000 Mcf per year to two paper mills, and 1,600,000 Mcf to Hamilton's electric division, and that this would generate additional revenue of $100,000 per year. He found that the industrial sales would also reduce Hamilton's average cost of gas and thereby improve its load factor from the present 33% to an estimated 57%.

Hamilton also offered testimony that its economy required industrial development and that large industrial gas users could not very well be attracted with the high rates required under CG&E's proposals. The city had acquired an industrial park at a cost of about $500,000 in which to locate much needed new industries. Natural gas could be supplied to industries locating in the park with a minimum investment since the Texas delivery point is to be located in the industrial development area.

The Commission in reviewing the record found savings to Hamilton of $1,242,976 over a ten-year period, and that CG&E had conceded benefits in this amount. The Commission added an additional $800,000 in benefits resulting from a general reduction in Texas' demand charge, which it had ordered in another proceeding after the hearing. The Commission was also of the opinion that the lower rates offered by Texas would enable Hamilton to make increased industrial sales which would increase its profits by about $100,000 per year, or a total of $1,000,000 in ten years. It stated, however, that there may be some question whether all of these benefits would be realized to the complete extent described, but that there was no question about minimum savings of $2,000,000 over the ten-year period.

But as we will point out later, there were other sub-

stantial benefits in addition to the minimum savings of $2,000,000.

CG&E contended before the Board that the change would result in a loss to it over the ten-year period, of $4,958,110, and that Ohio Fuel would lose $1.7 million in the same period. Both Examiner and Commission found no support for these claims in the evidence.

There was no doubt that the change in suppliers would have some adverse impact on CG&E and its suppliers, but the Commission found it was minimal. It found that CG&E under its last rate offer would gross only $12,002 per year in annual revenues in excess of its gas costs, and that these revenues were deficient by more than $148,000 annually to meet the full cost of service which CG&E was required to supply.

In this computation the Commission utilized CG&E's average cost of gas, which we think was proper. It was not required to base CG&E's cost of gas on certain low-cost gas which CG&E had proposed to purchase from Texas and Ohio Fuel. CG&E had not been authorized by the Commission to make such purchase and the Commission's action in this respect reflected its basic regulatory prohibition against the granting of preferences to individual customers or classes of customers. Furthermore, even if the allocation of low-cost gas had been allowed, CG&E would still not earn an adequate rate of return. Thus, if its latest offer was accepted, CG&E would be furnishing gas to Hamilton at a loss.

In rates which it filed with the Public Utilities Commission of Ohio CG&E represented that it would not increase these rates prior to November 1, 1969, but after that time it would be free to do so. There is considerable doubt whether the Ohio Commission has any jurisdiction over the

matter. *State ex rel Hamilton* v. *Public Util. Comm'n*, 10 Ohio St. 2d 172 (1967).[5]

Texas' proposal, on the other hand, carried with it a twenty-year service contract, subject to Commission jurisdiction and rate regulation. CG&E's proposal was not subject to Commission jurisdiction, and the rates after 1969 necessarily depended upon bargaining between the parties. Hamilton contended that it would have no protection against any excessive charges which CG&E might demand and that it could not very well compete with CG&E in the sale of gas to industrial users if CG&E had the power to determine its rates in gas purchases.

In this connection the Examiner found that CG&E's latest proposed rates were so low in relation to the cost of providing the service as to justify fear on the part of Hamilton that such rates were not likely to be as stable as those of Texas. This observation finds support in CG&E's willingness to guarantee these rates only through November 1, 1969, and the fact that, as noted above, the full cost of service to Hamilton by CG&E exceeded its projected revenue from that customer.

The Commission further found that the minimal loss which CG&E would suffer initially would be completely

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[5] This was an action in prohibition instituted by Hamilton against the Public Utilities Commission of Ohio, to prevent the Commission from considering an application filed before it by CG&E to fix rates. Subsequent to the filing of Hamilton's Section 7(a) application before the Power Commission, CG&E filed an action against Hamilton in the Common Pleas Court of Butler County, Ohio, seeking to enjoin Hamilton from discontinuing its purchase of gas from CG&E without first obtaining approval of the Public Utilities Commission of Ohio. The Common Pleas Court in an opinion dated February 23, 1966, held that such approval was not necessary; the Court of Appeals affirmed, and the Supreme Court of Ohio dismissed the appeal. In the prohibition action the Supreme Court of Ohio granted the writ on the ground that the judgment of the Common Pleas Court was res adjudicata of the controversy.

absorbed by 1969 by increased sales, at a better load factor, to other customers, particularly in the rapidly growing areas of Fairfield and New Miami, Ohio. Actually, its customers will benefit from a reduction in their average cost of gas after 1968 and the elimination of Hamilton, which is a poor load factor. Furthermore, CG&E's lines serving Hamilton will be used to serve its other customers. Hamilton is willing to purchase from CG&E the metering stations now serving it.

Both the Examiner and the Commission were in agreement that the changeover would not require an increase in rates to CG&E's other customers and that they would not be substantially harmed. On the other hand, Hamilton represented to the Commission that savings realized by it would be passed on to its customers in the form of rate reductions.

But CG&E argues that it would make more money if Hamilton's purchases were included in its gross income and that the Commission erred in utilizing the figures of its average cost of gas. This contention overlooks the fact that the service to Hamilton under CG&E's last offer was at a loss. This loss ought not to be charged against CG&E's other customers in determining the reasonableness of their rates. Nor should Hamilton be deprived of the opportunity to purchase gas at a lower rate and thereby benefit its own customers when CG&E's customers were not substantially adversely affected.

CG&E further contends that the Commission should not have taken into account the yearly increases of its sales at a better load factor to other customers in rapidly growing areas. While we do not believe this should be the sole criterion, we think it was one of the factors which the Commission had a right to consider. It was so held in

Lynchburg Gas Co. v. *Federal Power Comm'n*, 336 F. 2d 943, 947-948 (D.C. Cir., 1964).

Our discussion thus far has centered primarily upon the economic advantages and disadvantages accruing to the parties as a result of the Commission's order changing Hamilton's supplier. It was to this issue that the parties almost exclusively addressed themselves. But we think we should point out that the ultimate issue in a case of this nature goes beyond mere economics, to encompass the entire public interest.

The primary aim of the Natural Gas Act was the protection of consumers. *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 402 (1965); *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944); *Kentucky Natural Gas Corp.* v. *Federal Power Comm'n*, 159 F.2d 215 (6th Cir. 1947). In rate making the intent was that gas should be sold at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public service. *Fuels Research Council, Inc.* v. *Federal Power Comm'n*, 374 F.2d 842, 852 (7th Cir. 1967); *Atlantic Refining Co.* v. *Federal Power Comm'n*, 316 F.2d 677, 678 (D.C. Cir., 1963).

What has happened here is the elimination of a middleman and the substitution of a direct supplier who had a nearby pipeline. The Commission had competing proposals to consider and necessarily had to adopt one and reject the other. The situation is somewhat similar to that which existed in *Kentucky Natural Gas Corp.* v. *Federal Power Comm'n, supra.* In that case we held that the existing supplier was not granted the exclusive right under the Act to continue to serve in a given area, and that Commission had the right to grant a Certificate of Public Convenience and Necessity to a competitor. In that case the late Judge

Shackelford Miller, Jr., who wrote the opinion for the Court, said:

> "The elimination of an unnecessary middleman between the wholesaler and retailer is a material benefit to the ultimate consumer at retail."

The Court also held that the ruling of the Commission could not be set aside unless it was arbitrary. To the same effect is the opinion written by Judge Maris in the Shrewsbury case. *New England Power Co.* v. *Federal Power Comm'n*, 349 F.2d 258 (1st Cir. 1965).

We find that there was substantial evidence to support the findings of fact of the Commission. They are binding on us. 15 U.S.C. § 717r(b); *Universal Camera Co.* v. *NLRB*, 340 U.S. 474 (1951); *Cincinnati Gas & Elec. Co.* v. *Federal Power Comm'n*, 376 F.2d 506 (6th Cir. 1967). There was a reasonable basis for the Commission's findings and they were not arbitrary. We think also that it applied the correct rules of law.

Our observations with respect to CG&E apply with equal force to the contentions of Ohio Power and KGT. We approve the Commission's findings that the change in suppliers will have no significant impact on them and that as with CG&E, their minimal loss will be completely absorbed in a short period of time by increased sales to CG&E. The Commission was correct in denying the application of Ohio Power.

Affirmed.

Appendix A

(Filed February 16, 1968)

No. 17,888

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE CINCINNATI GAS & ELECTRIC COMPANY and THE CITY OF CINCINNATI,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent.

CITY OF HAMILTON, OHIO and TEXAS GAS TRANSMISSION CORPORATION,

Intervenors.

ORDER

BEFORE: WEICK, Chief Judge, O'SULLIVAN and PHILLIPS, Circuit Judges.

On Petition for Review of an order of the Federal Power Commission,

This cause came on to be heard on the transcript of the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the order of the Federal Power Commission be and it is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. CP65-402
CP66-13
CP66-207

CITY OF HAMILTON, OHIO
TEXAS GAS TRANSMISSION COMPANY
THE OHIO FUEL GAS COMPANY

PRESIDING EXAMINER'S INITIAL DECISON
UPON CONSOLIDATED APPLICATIONS
UNDER SECTION 7 OF THE NATURAL GAS ACT

(Issued August 8, 1966)

APPEARANCES

J. David Mann, Jr., *Frederick Moring*, and *E. Hjalmar Persson* for the City of Hamilton, Ohio

Christopher T. Boland and *George J. Meiburger* for Texas Gas Transmission Corporation

Walter E. Beckjord for The Cincinnati Gas & Electric Company

R. N. Mahaffey for Ohio Fuel Gas Company

H. Raymond Andrews, Jr. for Kentucky Gas Transmission Corporation

William B. Saxbe and *Theodore K. High* for Public Utilities Commission of Ohio

Wallace M. Power and *Paul J. Doppes* for City of Cincinnati

Robert O. Koch for Texas Gas Transmission Corporation

W. E. Hynan, Jr. and *M. S. Romanoff* for Federal Power Commission

LEVY, PRESIDING EXAMINER: This proceeding was initiated by Commission orders issued September 30, 1965, and January 21, 1966, consolidating for hearing an applica-

tion filed on June 16, 1965, under Section 7(a) of the Natural Gas Act by the City of Hamilton, Ohio (Hamilton), a municipally owned distributor, seeking a new supply of natural gas from Texas Gas Transmission Corporation (Texas Gas), with various competitive applications and proposals. These include an application filed on July 15, 1965, by Texas Gas for authorization pursuant to Section 7(c) of the Act to construct the necessary facilities at an estimated cost of $7,816,000, to sell and deliver the volumes of gas sought by Hamilton, a competitive application by The Ohio Fuel Gas Company (Ohio Fuel), and various rate and service proposals of Hamilton's present natural-gas supplier, Cincinnati Gas and Electric Company (Cincinnati Gas).

Interventions were permitted by orders issued on September 30, 1965, and February 11, 1966. Intervenors include Cincinnati Gas and the City of Cincinnati.

A prehearing conference was held on November 22, 1965, followed by various settlement conferences during January and February 1966. Hearing commenced on March 2, 1966, and concluded on March 4, 1966. After the close of the hearing, Exhibits 43, 44, and 45 were offered in evidence and a petition filed by Texas Gas to amend its application. Briefing was concluded on May 19, 1966.

Hamilton, a municipally owned and operated gas distribution system, serves more than 20,000 customers in an area of some 79,000 people, about 20 miles north of Cincinnati, Ohio. Since 1937, Hamilton has obtained its total gas supply from Cincinnati Gas, which in turn is supplied by The Ohio Fuel Gas Company (Ohio Fuel) and Kentucky Gas Transmission Corporation (KGT), both Columbia System Companies.

The sale of gas by Cincinnati Gas to Hamilton is not regulated by the Federal Power Commission, an exemption

having been granted under Section 1(c) of the Act on February 3, 1955, (Item C). Hamilton constitutes approximately 5% of Cincinnati Gas' market and is its only wholesale customer.

Prior to its present application, Hamilton investigated the alternative sources of supply with a view to obtaining the most economical service available. Its present contract with Cincinnati Gas was executed in 1957, and expires by its terms on September 3, 1966. By letter of February 26, 1966, Cincinnati Gas advised Hamilton that it would terminate the contract on the expiration date, and by letter of March 2, 1966, Hamilton acknowledged the notice and stated that even if Cincinnati Gas should seek to withdraw its letter of termination, Hamilton would terminate the contract.

Hamilton's alternative sources of gas are Texas Gas, whose main transmission system passes within the city limits of Hamilton, and Ohio Fuel. Formal negotiations between Hamilton and Cincinnati Gas ended with the decision of the Hamilton City council in April 1965, to seek Commission authorization for a supply of gas from Texas Gas. However, since the filing of the Hamilton application in June 1965, Cincinnati Gas has made successively more attractive offers, the latest of which proposes $2.03 per Mcf of demand and 30.5¢ per Mcf of commodity delivered with propane air service for an annual demand charge of $5.00 and 85.0¢ per Mcf commodity charge (Exh. 23). The presently effective rates are $2.3249 demand and 35.5¢ commodity (Tr. 240).

The Competing Proposals

In Docket No. CP66-13, as amended, Texas Gas seeks to construct and operate approximately 25.89 miles of 36" loop pipeline in Louisiana, 5.64 miles of 36" loop pipeline

near the Tennessee-Mississippi border, 20.81 miles of 30" loop pipeline in Kentucky, and a metering station in Ohio by means of which it would deliver up to 37,550 Mcf per day (contract demand) of natural gas to Hamilton at an estimated cost of $7,816,000. To receive such gas Hamilton would construct approximately 7.2 miles of pipeline and related facilities around the eastern outskirts of the city, together with five pressure regulating stations, at a total cost of $658,900.

The evidence introduced by Texas Gas in support of its application is uncontroverted; all parties having waived cross-examination of its witnesses. The facilities proposed are adequate to render the service requested by Hamilton; costs are reasonable; reserves adequate; and the project presents no problems as to engineering, financing, markets, or economic feasibility.

In addition to the Texas Gas facilities, Hamilton proposes to construct peak-shaving facilities at a cost of $340,000 in order to keep its peak-day contract demand purchases from Texas Gas at a level whereby Hamilton can take advantage of the 90% minimum demand payment provision in Texas Gas' tariff. Service by Texas Gas would be rendered under its G-4 Rate Schedule with a demand charge of $2.76 per Mcf and a commodity charge of 22.66¢ per Mcf (Exh. 5, Tr. 168-173). The proposed facilities around the eastern outskirts of Hamilton constitute the first phase of a high pressure pipeline loop, the second phase of which will be constructed by Hamilton as load growth dictates, and are estimated to cost approximately $500,000 (Exh. 1, Tr. 412-413).

Ohio Fuel prefers Cincinnati Gas to continue serving Hamilton since it is a partial supplier of gas to Cincinnati; but in Docket No. CP66-207, it seeks to serve Hamilton directly in the event it is determined that Cincinnati Gas

ought to be replaced by another supplier. In that event, Ohio Fuel seeks authorization to construct and operate some 38,000 feet of pipe and five metering and regulating stations at an estimated cost of $610,000 to deliver gas to Hamilton in the amount of 37,550 McfD in the first year, 42,350 McfD in the second year, and 43,250 McfD in the third year (Exhs. 34 and 35). The gas would be obtained in part from Texas Gas and would be sold to Hamilton under Ohio Fuel's CDS 2-A and WS Rate Schedules (Exhs. 35 and 36). Ohio Fuel's present commodity rate is 29.84¢ per Mcf, as compared with Texas Gas' proposed charge of 22.66¢ per Mcf.

In its latest proposal, Cincinnati Gas has offered peak-shaving service to Hamilton on a firm basis containing $5 per Mcf per annum demand charge and 85¢ per Mcf for all propane air delivered. It has offered to reduce its present rate from a $2.3249 demand charge and a 35.5¢ commodity charge to a $2.03 demand charge and a 30.5¢ commodity charge. In Exhibit 43, filed after the close of the hearing, Cincinnati Gas suggests the construction of two high pressure delivery points to connect Texas Gas' main transmission line with Hamilton and sets forth the alleged dollar advantage to Hamilton in this latest proposal.

Issues and Contentions

The Texas Gas-Hamilton proposal will provide Hamilton with the lowest cost gas supply. Cincinnati Gas agrees that "A Texas Gas supply would be cheaper for the City than supplies from either Cincinnati Gas or Ohio Fuel, in that order" (Br. p. 1).

The basic issue in this proceeding, therefore, is whether the benefits to Hamilton of a lower cost gas supply from Texas Gas are outweighed in the scales of the public interest by the adverse impact on Cincinnati Gas, its cus-

tomers, and suppliers. As noted by Cincinnati Gas in its reply brief, "The only real issue made by the briefs concerns the measurement of the harm to CG&E and its customers" (p. 1).

Hamilton claims it will save over $1,900,000 in the initial ten years of service from Texas Gas (Br., App. B, Sheet 1). Texas Gas' low commodity rate (22.66¢) is substantially below the lowest commodity charge proposed by Cincinnati Gas (30.5¢). The increased industrial sales made possible by this decrease in commodity rates will increase Hamilton's profits by some $100,000 per year, or $1,000,000 over the first ten years of service. Savings over Ohio Fuel's proposed service would be at least as large (Ham. Br., App. B, Sheet 2).

Cincinnati Gas argues that the monetary loss to it of the Hamilton load ($4,953,000) far outweighs the advantages ($1,242,976) to Hamilton. The Columbia companies, Ohio Fuel and Kentucky Gas, maintain that the benefits to Hamilton are substantially overstated and the adverse impact on Cincinnati Gas and Ohio Fuel unduly minimized. Both Cincinnati Gas and Ohio Fuel insist that their displacement by Texas Gas would seriously disrupt their operations, leave them with the burden of demand charges and idle facilities, and require the construction of unnecessary new facilities by Texas Gas and Hamilton.

The applications of Hamilton, Texas Gas, and Ohio Fuel meet all formal Commission requirements for certification pursuant to Section 7(c) of the Act (Staff Br., p. 6).

Staff supports the Texas Gas-Hamilton proposal which, in its view, will provide the lowest cost gas supply and permit a general rate reduction by Hamilton of about $300,000 per year, without resulting in any substantial harm to Cincinnati Gas, its suppliers or customers.

Appendix B

The Texas Gas-Hamilton Proposal

While the Texas Gas-Hamilton proposal will provide Hamilton with the lowest cost gas supply, the evidence is in conflict as to the extent of such savings in the cost of purchased gas. Hamilton claims savings of $1,907,215 over a 10-year period (Br., App. B). Cincinnati Gas concedes that Hamilton can purchase gas at a lower cost from Texas Gas by reason of the 90% minimum demand clause in Texas Gas' tariff, but estimates the saving at $1,242,976 over the same 10-year period. The difference between the two estimates lies in the cost of service assigned to the competing proposals by Hamilton and Cincinnati Gas. Hamilton claims it needs a low pressure loop at an estimated cost of $908,000 to continue its present purchases from Cincinnati Gas. It compares this cost with the sum of $1,158,000, the estimated cost of the high pressure transmission system around the city incident to the Texas Gas proposal.

Hamilton includes the difference between these two figures of $250,000 in the fixed charges associated with the Texas Gas proposal (Exhs. 7, 44). Cincinnati Gas does not include in its estimates any of the anticipated costs of the low-pressure loop which Hamilton says it will need to continue purchasing its future requirements from Cincinnati Gas (Exhs. 26, 43). Cincinnati Gas' Exhibit 43, filed after the close of the hearing, is a last minute proposal to meet this objection by suggesting the possibility of two more high pressure delivery points on the north and west sides of Hamilton to connect Texas Gas' mainline with Hamilton, thus obviating the need for the low pressure loop. However, the record does not show sufficient details to evaluate the feasibility and cost of this proposal on a comparative basis with the detailed proposals which were the subject of cross-examination during the hearing. In any

event, the Texas Gas-Hamilton proposal represents a substantial saving to Hamilton of at least $1,242,976 over the 10-year period.

Moreover, Hamilton witness Brush testified that Texas Gas' low commodity rate will enable Hamilton to make additional industrial sales of 1,500,000 Mcf per year to two papermills and 1,600,000 Mcf to Hamilton's electric division. These additional annual requirements total 3,100,000 Mcf (Tr. 90-92) and would provide an additional $100,000 per year savings to Hamilton, raising to $2,907,215 the 10-year's savings to Hamilton, if it is able to obtain its supply from Texas Gas at a commodity rate of 22.66¢ rather than Cincinnati Gas' proposed rate of 30.5¢.

Hamilton has invested large sums for an industrial park in an area adjoining the proposed connection with Texas Gas. Hamilton needs new industry, and a competitive advantage of approximately 5.5¢ per Mcf in its ability to make industrial sales should enable it to achieve the estimated potential load.

These increased industrial sales will reduce Hamilton's average cost of purchase gas from 48.3¢ per Mcf to 38¢, with a load factor improvement from Hamilton's present 35% to an estimated 57%. Further load factor improvement will produce additional savings. The savings projected by Hamilton with a Texas Gas supply are accepted as reasonable and as supported by the record.

A further advantage to Hamilton in the Texas Gas proposal is a firm 20-year service agreement subject to Federal Power Commission jurisdiction and rate regulation. Hamilton's present gas purchase contract with Cincinnati Gas terminates by its terms and by action of both parties on September 3, 1966. Cincinnati Gas' present sales to Hamilton are not subject to Federal regulation by virtue of

the exemption granted in February 1955, in Docket No. G-2535 under the provisions of the Hinshaw Amendment to the Natural Gas Act. Moreover, Hamilton is convinced that the Public Utilities Commission of Ohio (PUCO) cannot provide effective regulatory protection. In this connection, Hamilton cites a recent opinion by the Butler County Court of Common Pleas issued February 23, 1965, in an action filed by Cincinnati Gas to restrain Hamilton from obtaining a new gas supply, holding that the PUCO lacks regulatory jurisdiction over the Hamilton-Cincinnati Gas contract. The Court's denial of the relief sought by Cincinnati Gas was affirmed *per curiam* by the Ohio Court of Appeals on May 5, 1966.

By letter dated July 7, 1966, Cincinnati Gas' counsel submitted a copy of an order by the PUCO entered June 29, 1966, asserting jurisdiction over the sale of gas by Cincinnati Gas to Hamilton and approving the proposed rates offered by Cincinnati Gas.

The jurisdiction and ability of the PUCO to afford effective regulatory protection over the sales involved herein is in doubt. Moreover, the rates provided in Cincinnati Gas' latest proposal are so low in terms of the cost of providing such service [1] as to justify Hamilton's concern that these proposed rates are not as firm as the 20-year agreement proposed by Texas Gas.

Impact on Cincinnati Gas

Cincinnati Gas maintains that the proposed loss of the Hamilton load to Texas Gas is not in the public interest

[1] In Exh. 24, Hamilton is assigned the entire benefit of reduced costs arising out of the transfer of 7,200 McfD of existing gas demand from Ohio Fuel's CD rate to its WS rate (Tr. 123, 244) and lower costs out of its expected purchase of gas from Texas Gas (Tr. 344-346).

because "the harm to CG&E and its customers far outweighs any benefits to Hamilton" (Rep. Br., p. 1). Specifically, it contends that the facilities already installed and in operation to service Hamilton gas requirements, representing a net investment of $998,741 (Tr. 213-215), will be idled by the change of suppliers, and the fixed charges associated with such service transferred to Cincinnati Gas or its customers. Net losses before taxes are estimated by Cincinnati Gas at a minimum of $420,000 per year by the third year and extend indefinitely into the future (Exh. 25, Tr. 597). These losses include demand charges which it will have to pay its suppliers for gas it is obligated to purchase but will not be able to use without the Hamilton load, the markup on the sales to Hamilton, and the loss sustained by its inability to purchase 7,200 Mcf of additional Winter Service under the more favorable Columbia System WS tariff (Exhs. 24, 25), and 10,000 Mcf of low cost gas which it intends purchasing from Texas Gas. They do not include the adverse effect on Cincinnati Gas' principal suppliers, Kentucky Gas and Ohio Fuel, which Ohio Fuel estimates as $170,000 in fixed costs, or a total combined loss of $590,000.

Hamilton and Staff do not dispute that the loss of the Hamilton load will have some adverse impact on Cincinnati Gas and its suppliers. They suggest, however, that the actual losses are small and will be quickly offset by market growth, improved load factor, and a reduction in the average cost of purchased gas.

Staff's Appendix A shows that Cincinnati Gas' revenues received from Hamilton in 1968, will exceed its purchase gas costs by only $12,002, and will fall $148,060 below its full cost of service to supply Hamilton's gas requirements. Hamilton buys gas from Cincinnati Gas at a 35% load

factor, as against a 50% load factor for Cincinnati Gas' purchases from Ohio Fuel. In 1969, Cincinnati Gas' purchases without Hamilton will be greater than in previous years with Hamilton (App. B, Exh. 25). The decrease in Cincinnati Gas' average cost of gas from 43.25¢ in 1967 with Hamilton, to 43.12¢ in 1969 without Hamilton, will save Cincinnati Gas $154,923 (Staff Br. App. B). This saving will exceed the loss estimated by Cincinnati Gas—$153,811 (Exh. 24). Staff adds an additional offset of $352,590 in gross revenues ($279,674 after fixed expenses) which Hamilton will pay to Cincinnati Gas in 1967 under existing rates (Staff Br. App. C). In addition, the reduction in Cincinnati Gas' average cost of gas without Hamilton will benefit its remaining customers (See Staff Br. App. A).

The lines used to serve Hamilton will not be abandoned but will continue to be used to serve other customers, including the rapidly growing areas of Fairfield and New Miami (Tr. 453-454). Moreover, Hamilton has stated its willingness to purchase the metering stations now used to serve Hamilton.

The Hamilton load in the amount of 4,500,000 Mcf per year represents approximately 5% of Cincinnati Gas' total annual sales and little more than one year's load growth in 1968. It is less than one-half of Ohio Fuel's estimated load growth of approximately 11,579,000 Mcf in that year (Exh. 32).

The evidence shows that the impact on Cincinnati Gas of the loss of the Hamilton load will be absorbed by 1969, and will not result in any permanent substantial harm to Cincinnati Gas, its suppliers or customers (See Examiner's Table). In fact, its customers will benefit from a reduction in their average cost of gas after 1968, and the elimination

of Hamilton, a poor load factor customer. Nor is there any support for the implication that the loss of the Hamilton load will require a rate increase by Cincinnati Gas or Ohio Fuel, or otherwise jeopardize their ability to render natural-gas service. On the contrary, the customers of both Cincinnati Gas and Ohio Fuel will benefit from the lower gas purchase costs incident to the proposed new gas supply from Texas Gas. Finally, the minimal harm to Cincinnati Gas and Ohio Fuel is more than outweighed by the substantial permanent benefits to Hamilton of the Texas Gas connection.

Judicial Precedents and Commission Policy

All parties invoke the same judicial precedents which hold generally that a public utility does not have a monopoly on its existing market and that a customer company may be authorized to change suppliers, or to obtain additional increments of gas from a second supplier, when and where the public interest requires.[2]

The real issue here, as noted previously, is the determination of the public interest in the light of the specific advantages and disadvantages of the competing proposals.

Two of the decisions cited are particularly applicable to the instant proceeding. Cincinnati Gas emphasizes the alleged permanent impact of the loss of the Hamilton load

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[2] *Arkansas Louisiana Gas Co.* v. *Federal Power Commission*, 113 F.2d 281 (5th Cir. 1940); *Home Gas Co.* v. *F.P.C.*, 231 F.2d 253 (D.C. Cir. 1956), cert. denied 352 U.S. 821 (1956); *Kentucky Natural Gas Corp.* v. *F.P.C.*, 159 F.2d 215 (6th Cir. 1947); *Lodi Telephone Co.* v. *Public Service Commission*, 262 Wisc. 416, 55 N.W.2d 37[illegible] (1953); *Lynchburg Gas Co.* v. *F.P.C.*, 336 F.2d 942 (D.C. Cir. 1964); *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 169 F.2d 881 (D.C. Cir. 1948), cert. denied 335 U.S. 854 (1948); *Shrewsbury Municipal Light Department* v. *New England Power Co.*, 32 *F.P.C.* 373 (1964), aff'd *sub nom. New England Power Co.* v. *F.P.C.*, 349 F.2d 258 (1965).

on its gross revenues for the indefinite future including the loss of future profits or markup and the right to grow in Winter Service (Exh. 25). The *Lynchburg* decision, cited *supra*, however, suggests that this is an improper test for measuring the impact of market loss. The proper test is the impact on total revenues, or the net loss; rather than the loss in rate of growth. As noted by Judge Fahy (p. 947) "Even should there be a substantial decline in Seaboard's sales to Lynchburg, or some other customers similarly situated, *this loss might be more than offset by an increase in other sales.*" *(Emphasis supplied)*

The record in this proceeding indicates that the loss of the Hamilton load will be more than offset after 1968, by an increase in Cincinnati Gas' other sales, improved load factor in its gas purchases, and a reduction in its average cost of purchased gas.

In the *Shrewsbury* decision, cited *supra*, the Commission eliminated the middleman, Mass Electric, the existing supplier to the town of Shrewsbury, and concluded that Shrewsbury should be served directly by NEPCO on the ground that direct sales by NEPCO would save the town over $42,000 a year and permit Shrewsbury to compete for industrial loads with the surrounding areas. The analogy between Cincinnati Gas and Mass Electric is a close one. Cincinnati Gas is not an interstate pipeline supplier; it is a distribution company. Hamilton is its only wholesale customer. Its replacement here by Texas Gas represents the replacement of a middleman, Cincinnati Gas, by a direct long line pipeline supplier, Texas Gas. As noted in *Kentucky Natural Gas Corp.* v. *F.P.C.*, cited *supra*, p. 219, "The elimination of an unnecessary middleman between the wholesaler and the retailer is a material benefit to the ultimate consumer at retail." Ohio Fuel and Ken-

tucky Gas are in an intermediate position between Cincinnati Gas and Texas Gas. This does not suggest that every distribution company selling gas for resale should be replaced by a pipeline supplier passing through the service area of its customer companies. It does suggest that where, as here, the loss of the Hamilton load will be absorbed by Cincinnati Gas' load growth, will not require higher rates, and will benefit the customers of Hamilton and Cincinnati Gas with lower gas costs, the public interest is not served by barring Hamilton from access to the direct, lower cost source of pipeline gas represented by Texas Gas. Continuation of Cincinnati Gas as Hamilton's sole supplier provides no economic or operating advantage to Hamilton or the consuming public.

Finally, Cincinnati Gas emphasizes the "heavy burden" on Hamilton "to show that the switch is in the public interest" (Rep. Br. p. 1). In *Kentucky Natural Gas Corp.* v. *F.P.C.* cited *supra*, the Court approved an order of the Commission permitting Central Illinois to replace Kentucky Natural Gas Corporation with Panhandle as the sole supplier for the Mattoon area.

> Where two competing applicants are both qualified to perform the proposed service, the Commission is necessarily called upon to rule in favor of one and against the other. Such a ruling can not be set aside on this review unless shown to be arbitrary. (citing cases.) The burden of making such a showing falls upon the petitioner. It has not been met in this case. Its chief contention in attempting to meet this burden is that it has been satisfactorily supplying this territory since 1932 by obtaining natural gas from Panhandle and delivering it to Central Illinois through its own facilities at a point on the Indiana-Illinois state line, and that while Central Illinois has been earning a fair return on its rate base, Kentucky Natural has been

operating at a loss for many years and its ability to render adequate service at reasonable rates in its remaining area would be jeopardized by the loss of its sales to Central Illinois. But a right to continue to exclusively serve the Mattoon area is not granted to it by the Natural Gas Act. On the contrary, § 717f(g), Title 15 U.S.C.A. appears to specifically recognize the right of the Federal Power Commission to issue a certificate of public convenience and necessity to a competitor, by providing "Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural gas company." (Citing case.) The Commission also found as a fact that the record does not show that the ability of Kentucky Natural to render natural gas service will be jeopardized by the loss of the business of Central Illinois, thus factually rejecting petitioner's contention in that respect. This negative finding is supported by the evidence (p. 218).

The evidence in this proceeding supports the conclusion that the proposed switch to Texas Gas is in the public interest and that the ability of Cincinnati Gas, Ohio Fuel, and Kentucky Gas to render natural-gas service will not be jeopardized by the loss of the Hamilton load.

CONCLUSION

Hamilton has expressed its willingness to continue buying gas from Cincinnati Gas at applicable rates until September 3, 1967. Staff, in recommending that the Hamilton-Texas Gas proposal be certificated, suggests that Commission approval be conditioned to require Hamilton to continue receiving its natural-gas requirements from Cincinnati Gas until November 1, 1967, "in order to mitigate such damages Cincinnati Gas may incur through the

loss of sales to Hamilton." (Staff Br., p. 28.) The Staff proposal is adopted as reasonable. The delay will also permit Cincinnati Gas to renegotiate its tariff with the Columbia System Companies in the light of the prospective loss of the Hamilton load and the Commission's ultimate decision in *Atlantic Seaboard Corp.*, Docket Nos. G-16401, *et al.*, in which the Examiner recently held, *inter alia*, that Kentucky and Ohio Fuel have not shown that their PR rates are justified or lawful. (See Initial Decision issued July 14, 1966, p. 27.)

Texas Gas' petition to reopen the proceedings for the limited purpose of receiving Exhibit 45, the testimony relating hereto, and amending its application is granted. Exhibits 43, 44, 45, and Item G are received in evidence.

ADDITIONAL FINDINGS AND CONCLUSIONS

Upon consideration of the entire record in this proceeding including the pleadings, the evidence adduced, and the briefs filed, it has been found and concluded, in addition to the findings and conclusions heretofore stated, that:

(1) The City of Hamilton, Ohio, is a municipality engaged in the distribution of natural gas to the public and an applicant herein. It owns and operates its gas distribution system and purchases its natural-gas requirements from the Cincinnati Gas and Electric Company, a public utility under the laws of Ohio, for distribution within the city limits of Hamilton.

(2) Texas Gas Transmission Corporation and The Ohio Fuel Gas Company, applicants in Docket Nos. CP66-13 and CP66-207, respectively, are natural-gas companies within the meaning of the Natural Gas Act subject to the jurisditcion of this Commission.

(3) Applicants are able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act and the requirements, Rules, and Regulations of the Commission thereunder.

(4) Cincinnati Gas is a public utility distribution company selling natural gas and electricity in the southwest corner of Ohio and by virtue of the exemption granted in February 1955 in Docket No. G-2535, under the provisions of the Hinshaw Amendment to the Natural Gas Act, its gas operations are not now subject to the jurisdiction of this Commission.

(5) The order sought by Hamilton in Docket No. CP65-402, and the construction and operation of the facilities proposed by Texas Gas in Docket No. CP66-13, as amended, are required by the public convenience and necessity subject to the condition, however, that Texas Gas shall not commence service to Hamilton prior to November 1, 1967, and that Hamilton shall continue to purchase its natural-gas requirements from Cincinnati Gas at not less than the applicable lawful rate for such sales until November 1, 1967.

ORDER

WHEREFORE, IT IS ORDERED, subject to review by the Commission on appeal or upon its own motion, as provided by its Rules of Practice and Procedure, that:

(A) A certificate of public convenience and necessity is hereby issued to the Texas Gas Transmission Corporation and said Company is hereby directed, pursuant to Section 7(a) of the Act, to sell gas to the City of Hamilton, Ohio, on the conditions set forth herein, authorizing the sale of natural gas in inter-

state commerce for resale for ultimate public consumption, and for the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, all as more fully described in the applications, as amended.

(B) The certificate herein issued to the Texas Gas Transmission Corporation, Docket No. CP66-13 and the Order pursuant to Section 7(a) of the Act, are subject to the condition that Texas Gas shall not commence service to Hamilton prior to November 1, 1967, and that Hamilton shall continue to purchase its gas requirements from Cincinnati Gas at not less than the applicable lawful rates for such sales until November 1, 1967.

(C) The application of The Ohio Fuel Gas Company in Docket No. CP66-207 is denied.

/s/ WILLIAM C. LEVY
WILLIAM C. LEVY
Presiding Examiner

Appendix B

EXAMINER'S TABLE

EFFECT OF THE LOSS OF THE HAMILTON LOAD ON CINCINNATI G & E OHIO FUEL AND KENTUCKY COST TRENDS ASSUMING HAMILTON DISCONNECTS 1-1-65
Data from Ex. 25 (CG & E)

	CGE Purchases from K.G.T.			*CGE Purchases from Ohio Fuel*		
	Sum of Contract Dem.-Mcf	*Annual Volumes-Mcf*	*Cost of Gas to C.G.E.*	*Sum of Contract Dem.-Mcf*	*Annual Volumes*	*Cost of Gas to C.G.E.*
1967	391,745	71,198,300	$30,754,850	90,000	16,500,000	$7,146,840
1968	391,745	71,430,792	$30,790,529	90,000	15,953,592	$7,042,356
Inc. or (Dec.)	—	232,492	$ 75,779	—	(546,408)	$ (104,484)
1969	402,595	71,481,347	$31,000,111	90,000	16,000,000	$7,056,000
Inc. or (Dec.) over 1967 ..	10,855	283,047	$ 275,261	—	(500,000)	$ (90,480)
Total Inc. or (Dec.)	10,855	515,539	$ 351,040	—	(1,046,408)	$ (195,324)

Cincinnati G & E Load Growth (Inc. Affiliates)

(1965 Report to Stockholders)

Year	*Annual Sales-Mcf*	*Annual Increase-Mcf*	
1956	63,559,000	—	
1957	67,973,000	4,414,000	
1958	72,686,000	4,713,000	
1959	76,221,000	3,535,000	
1960	81,393,000	5,172,000	
1961	84,790,000	3,397,000	
1962	88,029,000	3,239,000	
1963	89,885,000	1,856,000	
1964	95,518,000	5,633,000	
1965	98,487,000	2,969,000	
	818,541,000	34,928,000	
	81,854,100	3,492,800	Avg. per Yr. (Hamilton load for 1968—4,810,816 Mcf)
		4.27%	Avg. per Yr.

Appendix B

City of Hamilton, Ohio
Docket No. CP65-102 *et al.*

C.G.E. Purchases from Texas Gas			*C.G.E. Total Purchases*			
Sum of Contract Dem.-Mcf	*Annual Volumes-Mcf*	*Cost of Gas To C.G.E.*	*Sum of Contract Dem.-Mcf*	*Annual Volumes Mcf*	*Cost of Gas*	*Cost of Gas per Mcf.*
—	—	—	481,745	87,698,300	$37,871,690	43.18¢
—	—	—	481,745	87,384,384	$37,832,885	43.29¢
				(313,916)	$ ($38,805)	0.11¢
10,000	3,650,000	$1,158,290	502,595	91,131,347	$39,214,401	43.03¢
			20,850	3,433,047	$ 1,342,711	(0.15¢)
10,000	3,650,000	$1,158,290	20,850	3,433,047	$ 1,342,711	(0.15¢)

Ohio Fuel Load Growth (Ex. 32)

Year	*Peak Day Mcf.*	*Annual Sales Mcf*	*Annual Inc. Peak Day*	*Annual Volumes*	
1964 Act.	—	368,207,585		19,141,214	
1965 Est.	2,492,800	387,348,799		16,841,401	
1966 "	2,577,600	404,190,200		11,578,500	
1967 "	2,668,200	415,768,700		16,673,600	
1968 "	2,742,600	432,442,300		13,166,300	
1969 "	2,822,000	445,608,600	5 yrs.	77,401,015	(15,480,200 Avg. per yr. 3.79% Avg. per yr.)
		2,453,566,184			
	Avg.	408,927,697			

Appendix B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. CP65-402
Docket No. CP66-13
Docket No. CP66-207

CITY OF HAMILTON, OHIO
TEXAS GAS TRANSMISSION COMPANY
THE OHIO FUEL GAS COMPANY

OPINION No. 513

APPEARANCES

J. David Mann, Jr., *Frederick Moring*, and *E. Hjalmar Persson* for the City of Hamilton, Ohio

Christopher T. Boland, *George J. Meiburger*, and *Robert O. Koch* for Texas Gas Transmission Corporation

Walter E. Beckjord for The Cincinnati Gas & Electric Company

R. N. Mahaffey for The Ohio Fuel Gas Company

H. Raymond Andrews, Jr. for Kentucky Gas Transmission Corporation

William B. Saxbe and *Theodore K. High* for Public Utilities Commission of Ohio

Wallace M. Power and *Paul J. Doppes* for the City of Cincinnati

W. E. Hynan, Jr. and *M. S. Romanoff* for the Federal Power Commission

Appendix B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles P. Ross, Carl E. Bagge, and John A. Carver, Jr.

CITY OF HAMILTON, OHIO
TEXAS GAS TRANSMISSION COMPANY
THE OHIO FUEL GAS COMPANY

Docket No. CP65-402
Docket No. CP66-13
Docket No. CP66-207

OPINION No. 513

OPINION AND ORDER ISSUING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AND DIRECTING NATURAL GAS SERVICE

(Issued January 24, 1967)

BAGGE, Commissioner:

FACTS

This proceeding originated with an application filed on June 16, 1965, by the City of Hamilton, Ohio (Hamilton), a municipal distributor, under Section 7(a) of the Natural Gas Act. It seeks authorization to divert its entire future gas supply from its present supplier, The Cincinnati Gas & Electric Company (Cincinnati Gas), to a new supplier, Texas Gas Transmission Company (Texas Gas). The basic facts are fully described in an initial decision issued by Examiner William C. Levy on August 8, 1966. Hence they need be recounted here only briefly. Hamilton seeks an order directing Texas Gas to establish a connection and

to sell and deliver its total gas requirements of up to 37,550 Mcf per day [1] in the initial year of service. Hamilton would construct facilities costing $658,900 in order to transport the gas within its distribution system.[2] Texas Gas is willing and able to supply Hamilton. It has applied for the necessary certificate authorization to construct main line loop facilities costing $7,816,000. Cincinnati Gas opposes issuance of a certificate to Texas Gas and the order sought by Hamilton. The Ohio Fuel Gas Company (Ohio Fuel), a major interstate supplier of Cincinnati Gas, has also applied for certificate authorization of $629,000 in facilities to enable it to sell the volumes of gas sought by Hamilton. Ohio Fuel's application is conditional. It requests consideration only if the Commission concludes that Hamilton should not continue to be supplied by Cincinnati Gas.

Hamilton has obtained its total gas supply from Cincinnati Gas since 1937. The sale and service as presently rendered is not regulated by this Commission. A "Hinshaw" exemption under Section 1(c) of the Natural Gas Act was granted Cincinnati Gas in 1955, 14 FPC 534. The latest service contract was for a base period ending September 3, 1966, to continue thereafter from year to year unless and until terminated by notice of either party. The contract further provided that notice was to be given no less than six months prior to the desired termination date.[3] On February 26, 1966, after Hamilton's application had been filed but before the hearing thereon was held, Cincinnati Gas notified Hamilton that it was exercising its option

[1] Except as otherwise noted, all volumes and rates are stated at 14.73 psia.

[2] Further distribution facilities costing an additional $500,000 would be built by Hamilton as needed to meet the needs of its consumers.

[3] Exhibit 1, Section 1.

to terminate the contract on the primary expiration date, September 3, 1966. By letter dated March 2, 1966, Hamilton acknowledged receipt of Cincinnati Gas' termination notice. The present service is being continued on an interim basis pending the resolution of this proceeding.

Hamilton currently buys approximately 4,500,000 Mcf annually. It constitutes 5% of Cincinnati Gas' market and is its only wholesale customer. Hamilton's desire to replace Cincinnati Gas as its supplier is based on the lower average gas costs which will result from service by Texas Gas and the benefits which it claims can be secured from the cost savings. Cincinnati Gas argues that it should not be replaced as Hamilton's supplier on the ground that the alleged benefit to be derived from the Texas Gas service will not outweigh the detriment to it and its other customers if the Hamilton sale is lost. It contends that its ten-year loss will total $4,958,110 as against its maximum concession of a $1,242,976, saving by Hamilton.

Ohio Fuel supports Cincinnati Gas. If we find, however, that the public interest dictates that Hamilton should be given a new supplier, Ohio Fuel contends that it should be permitted to render the service. This result, it contends, will permit Cincinnati Gas to reduce its contract demand with it to the extent of the Hamilton load loss until Cincinnati Gas' remaining market growth absorbs such loss. Ohio Fuel argues that its proposal provides sufficient benefits with the least detriment to Cincinnati Gas. Under Ohio Fuel's proposal the gas required to supply Hamilton would be secured partly from Texas Gas and in part through reductions in the requirements of Cincinnati Gas and Columbia Gas of Ohio, Inc., another of its customers. The advantage of its proposal to Hamilton lies in Ohio Fuel's offer to build the circumferential distribution facilities deemed necessary by the latter.

The case has been briefed and argued by the parties.[4] It is before us on exceptions[5] to an examiner's decision: (1) granting Hamilton and Texas Gas' applications; (2) denying the continued service by Cincinnati Gas; and (3) denying the service sought by Ohio Fuel.

HOLDING

We agree with the examiner's conclusion that the certification of Texas Gas as the future supplier of Hamilton is in the public interest. We also agree with his finding that the ability of Cincinnati Gas, Ohio Fuel and Kentucky Gas to render natural gas service will not be substantially impaired by the loss of the Hamilton load. Accordingly, with the additional findings expressed herein, and to the extent consistent herewith, we adopt the initial decision and order as our own.

DISCUSSION

The evidence conclusively establishes that Hamilton and its customers will obtain significant economic benefits from the change in suppliers. First, there are substantial monetary savings and additional increases in net revenue which Hamilton can reasonably be expected to realize in the first ten years of service from Texas Gas. These direct dollar savings consist of (1) $1 million in lower gas purchase costs; (2) $900,000 from the operation of Texas Gas' 90 percent minimum demand payment provision; and (3) an additional $800,000 from the recent reduction in Texas

[4] Other parties to the proceeding, in addition to the applicants, Cincinnati Gas and Staff, are the City of Cincinnati, Kentucky Gas Transmission Corporation and the Public Utilities Commission of Ohio.

[5] Filed by Cincinnati Gas, City of Cincinnati, Ohio Fuel and Kentucky Gas (jointly) and the Ohio Commission. Staff agrees with the examiner's decision.

Gas' demand charge.[6] In addition, Hamilton has shown that with the lower cost commodity charge of Texas Gas it will be able to make increased industrial sales, not possible under the Cincinnati Gas rate, which will increase its profits by approximately $100,000 per year, or $1 million over the first ten years of service. There may be some question as to whether all of the foregoing benefits will in fact be realized to the complete extent described. There is no question, however, but that Hamilton will realize minimum savings of $2 million over the ten year period. Cincinnati Gas conceded that Hamilton will realize savings of $1.2 million and this computation did not include the additional $800,000 which would result from the reduction in Texas Gas' demand charge. Hamilton has represented that these savings will inure to the benefit of its customers in the form of a rate reduction.

As noted, Texas Gas' 22.22-cent commodity charge[7] will enable Hamilton to generate additional industrial sales. Three sales which the record indicates Hamilton can secure are a total of 1,500,000 Mcf annually to Champion Paper, Inc. and Beckett Paper Co. and 1,600,000 Mcf per year to Hamilton's own Electric Division. These sales will, in themselves, raise Hamilton's load factor from its present 33 percent to an estimated 57 percent. Accordingly, Ham-

[6] Service by Texas Gas to Hamilton will be rendered under the former's G-4 rate schedule. At the time of the hearing, this schedule had a demand charge of $2.76 per Mcf and a commodity charge of 22.66¢ per Mcf at 15.025 psia (equivalent to $2.71 and 22.22¢ per Mcf, respectively, at 14.73 psia). On November 8, 1966, we issued an order approving a reduction in the demand charge to $2.58 per Mcf at 15.025 psia, or $2.53 at 14.73 psia. Cincinnati Gas' rate to Hamilton, at termination of contract, was $2.3249 demand and 35.5¢ per Mcf commodity; its last rate offer for continuing service to Hamilton, which has been approved by the Ohio Commission, proposed charges of $2.03 demand and 30.5¢ per Mcf commodity.

[7] This rate is more than 8¢ per Mcf less than Cincinnati Gas' best offered rate and over 13¢ below its last contract rate.

ilton's unit gas cost for all its purchases will be reduced by at least 10 cents per Mcf. Significantly, Hamilton's witness testified that the City's economy requires the development of new industry and that large industrial gas users cannot be attracted at the resale rates which necessarily would be charged if Hamilton continued its purchases from Cincinnati Gas. Hamilton estimates that without a new source, it will be unable to grow to any substantial extent. Conversely, with the new lower cost supply, Hamilton anticipates that it will make not only the additional industrial sales here detailed, totalling at least 3,100,000 Mcf annually, but will be able to attract new industry to locate in a new industrial park in which Hamilton has invested $500,000. Since the Texas Gas delivery point would be located within the industrial development area, Hamilton would be able to serve these large industrial gas loads with a minimum of investment.

Hamilton contends that it is now at a point where it must increase its distribution facilities. It can accomplish this either by building a high pressure loop around the city by reinforcing its system internally at low pressures. The Texas Gas supply will permit the construction of the high pressure loop around the city, as needed to meet customer requirements, along the most economical lines. The cost would be slightly more than would be required if Hamilton were to construct the less efficient internal reinforcement. The need for the loop is disputed by Cincinnati Gas. Further, Ohio Fuel argues that, under its proposal, it can provide Hamilton with gas where it can best utilize the supply. Based on the evidence of record, we will accept Hamilton's contention that future residential and industrial service will best be accomplished along the lines which it proposes.

Appendix B

Our analysis has concerned itself up to now solely with the economic advantages which can reasonably be said to accrue to Hamilton from service by Texas Gas. It is also incumbent upon the Commission in any evaluation of a proposal such as this to consider whether such economic advantages would tend to be outweighed by economic disadvantages to the customers of Cincinnati Gas or Ohio Fuel by the withdrawal of the Hamilton load.[8] Indeed, we are obligated, in attempting to discern the public interest in this proceeding, to give full consideration to any relevant counter-balancing economic considerations. In approaching this aspect of the proceeding, we begin with the basic premise that *Lynchburg*[9] established the test for evaluating the nature and scope of injury to be sustained by the loss of a particular load. The rule of *Lynchburg*, as we interpret that decision, makes it clear that no useful purpose is served by discussing in general terms, a loss in revenues or a simple reduction in rate of growth unless these circumstances are translated, by a proper showing, into proof of substantial actual detriment to the customers of Cincinnati Gas or Ohio Fuel. It is only this latter showing of detriment which can then be weighed in the balance against the established advantages to Hamilton's consumers in determining the overall public interest.[10] Moreover, we find no support for the contention advanced herein that any different test was established by Shrewsbury.[11] In that

[8] In referring to Ohio Fuel, we also include Kentucky Gas Transmission Corporation, both affiliated companies of the Columbia Gas System and co-suppliers of Cincinnati Gas. We note, however, that Counsel for the companies admitted that, in the long run, ". . . the burden would fall completely on Ohio Fuel." (Tr. p. 723.)

[9] *Lynchburg Gas Co.* v. *F.P.C.*, 336 F. 2d 942 (DC Cir., 1964).

[10] See *Columbia Gulf Transmission Co., et al.*, Docket Nos. CP65-102, *et al.*, Opinion No. 512, issued concurrently herewith.

[11] *Shrewsbury Municipal Light Department* v. *New England Power Co.*, 32 FPC 373 (1964), affirmed *sub nom.*, *New England Power Co.* v. *F.P.C.*, 349 F. 2d 258 (1965).

case [12] the town of Shrewsbury, a local distributor, requested that NEPCO be required to sell power to it directly rather than through Massachusetts Electric, an affiliate of NEPCO serving as a middleman in the chain of supply. We granted Shrewsbury's petition on a finding that substantial benefits would be realized from the direct service and that there would be no material offsetting detriment experienced by the existing supplier. In evaluating the detriment we calculated the amount of net income which would be foregone as a result of the market loss and measured the effect that this would have on Massachusetts Electric's total net operating income. In both the court's *Lynchburg* decision and in our decision in *Shrewsbury*, first, the methodology of balancing the benefits against the detriments was employed and, second, the same economic factors were utilized in making that evaluation. We have adhered to these principles.

Cincinnati Gas claims that it will suffer a net operating revenue loss of $2.4 million over ten years if deprived of the Hamilton market. It also asserts that Ohio Fuel will lose an additional $1.7 million in the same period. The examiner considered these contentions but concluded that they were not supported. While the mechanics of the arithmetical computations leading to the allegation are discussed by the examiner (and their deficiencies noted) it is appropriate to focus here on some of the more obvious weaknesses contained in Cincinnati Gas' calculations. First, while Cincinnati Gas shows a before tax loss of $420,000 by the third year, staff showed that under its last rate offer Cincinnati Gas would gross only $12,002 per year in annual revenues in excess of its purchased gas

[12] The action arose under Section 202(b) of the Federal Power Act, which is similar in most material respects to Section 7(a) of the Natural Gas Act.

costs. The staff further showed that these revenues would be deficient by more than $148,000 annually in meeting the full cost of service associated with the sale. Although Cincinnati Gas may be expected to experience an increase in its purchased gas costs in the amount of $35,000 in the first year that Hamilton is off its system (.04¢ per Mcf), its average purchased gas costs actually will have decreased by .13¢ per Mcf by the third year. This reduction is attributable both to the fact that by 1969 Cincinnati Gas' purchases without Hamilton will be greater than in previous years with the Hamilton load and, further, that Cincinnati Gas' retail customers, on an overall basis, purchase their requirements at greater load factors than does Hamilton. These elements, when considered together with an improved pattern of takes from Ohio Fuel and Kentucky Gas projected by Cincinnati Gas, results in an actual savings by Cincinnati Gas of $155,000 annually.[13]

The calculations introduced by Cincinnati Gas presuppose that it will be able to transfer 7,200 Mcf per day of purchases currently made by it from Ohio Fuel from contract demand service to the latter's lower priced winter service rate schedule. Cincinnati also proposes to allocate to the Hamilton service certain purchases of lower cost gas which it hopes it will be able to make from Texas Gas. By our order dated November 23, 1966, Ohio Fuel was advised that its proposed service agreement with Cincinnati Gas implementing the transfer of the 7,200 Mcf daily quantity to WS service was unlawful. We found that the transfer was contrary to the terms of Ohio Fuel's Gas Tariff and that the conditional availability of the volumes sought to

[13] The calculations are based on exhibit material submitted by Cincinnati Gas. All uncertainties were resolved to the benefit of Cincinnati Gas in order to show the maximum detriment possible.

be transferred [14] was inconsistent with the expressed 20-year term of the agreement. As to the attempted allocation of 5,000 Mcf per day of lower cost gas to Hamilton, assuming such an allocation is appropriate,[15] it is sufficient to note that Cincinnati Gas' application for an order directing Texas Gas to furnish the supply is still pending before the Commission in a contested proceeding.

The evidence is clear that Cincinnati Gas' loss of the Hamilton market will shortly be offset by an increase in Cincinnati Gas' other sales. These sales will be made at a better load factor than the present sale, and Cincinnati Gas will experience an actual reduction in its average cost of purchased gas without this load. There is no indication in the record that the loss of Hamilton will occasion any increase in rates to Cincinnati Gas' other customers or that they will be substantially harmed. We note that the examiner included a condition in his decision, proposed by staff and agreed to by Hamilton, which requires Hamilton to continue buying gas from Cincinnati Gas at the applicable rate until November 1, 1967, the date on which new nominations by Cincinnati Gas on its suppliers would become effective. We agree with the examiner that the condition is reasonable and should be adopted.

Cincinnati Gas also argues that the loss of the Hamilton load would mean that certain of its facilities now devoted to the present service will no longer be used or useful and that, as a consequence, its remaining customers will be required unfairly to bear the burden of the undepreciated

[14] Conditioned on Cincinnati Gas' retention of Hamilton as its customer.

[15] But see, *Colorado Interstate Gas Co.*, Opinion No. 235, 11 FPC 324, 354 (1952); *Colorado Interstate Gas Co.*, Opinion No. 313, 19 FPC 1012, 1020-1021 (1958); *Texas Gas Transmission Corp.*, Opinion No. 327, 22 FPC 378, 384 (1959); *United Gas Pipe Line Co.*, Opinion No. 428, 31 FPC 1180, 1196-1198 (1964).

costs. Without passing on the question of whether the proper valuation for these facilities is $1 million, as contended by Cincinnati Gas, or only $300,000, as claimed by Hamilton, the record clearly establishes that the laterals leading to Hamilton from Cincinnati Gas' main north-south line are also used to service the fast growing suburban areas of the City of Cincinnati, including the Cities of Fairfield and New Miami. Hence, although the load factor in these lines will be diminished initially, this should occasion little more than a short-term adjustment before the resulting slack is picked up by other sales. Hamilton has offered to purchase four of the five sales and metering stations now used by Cincinnati Gas in making its deliveries, the fifth station being used primarily to make other deliveries.

Ohio Fuel argued that it will fail to recover $170,000 of its fixed costs without the sale to Cincinnati Gas for Hamilton. The record, however, shows that Ohio Fuel's commodity rate contains 3.4¢ per Mcf for coverage of fixed charges. It calculates its loss by multiplying this amount by 4,995,605 Mcf, the estimate of the sales Cincinnati Gas would make to Hamilton in 1970 in the absence of the certification of Texas Gas.[16] However, as is apparent from Cincinnati Gas' own exhibits, a total cut-back on Ohio Fuel in the first year will be only 546,408 Mcf, or a reduction loss of less than $18,600 in the coverage of fixed costs. This amount is minimal and will have no significant effect on Ohio Fuel or its customers.

Although Ohio Fuel's application qualifies for consideration on a competitive basis with the other proposals, its rate for service to Hamilton would be little better[17] than

[16] Tr. page 265; Exhibit 3, Section 1, page 5.

[17] Within 1 cent per Mcf on the commodity charge for contract demand service.

Cincinnati Gas' last offer. Hamilton has shown that service from Ohio Fuel would cost it almost $2 million more in the first ten years of operation than would service from Texas Gas. Thus, the same deficiencies associated with the comparatively higher commodity charge of Cincinnati Gas *vis a vis* the Texas Gas rate are present in Ohio Fuel's application. We agree with Hamilton's statement in its brief that ". . . service from Ohio Fuel, even under the most favorable circumstances, would be virtually on a par with that from C.G.&E." Finally, to the extent that a portion of the gas supplied would be purchased by Ohio Fuel from Texas Gas, its proposal amounts to little more than the replacement of one intermediate supplier by another.[18] We note that Hamilton is the only existing distributor in the state of Ohio which does not have a direct source of supply from an interstate pipeline but is compelled to buy from another intrastate distributor. In our opinion, the Texas Gas-Hamilton proposal is to be preferred to the service proposed by Ohio Fuel. The certificate requested by Ohio Fuel will be denied on the basis that the issuance thereof is not required by the present or future public convenience and necessity.

Ohio Fuel argues that a certificated load for an existing market such as Hamilton is outside the area of competition and claims that we may not certificate a new supplier therefor "without compelling reasons." It relies on *U.S.* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 660 (1964). We do not read *El Paso* that way. *El Paso* did not limit the scope of our discretion in a case of this nature merely to the question of who shall supply intermediate loads. The

[18] We do not overlook the fact that Ohio Fuel, in its usual course of business, is a long-line interstate supplier. Our comment is limited to the bounds of the proposal which it here advanced.

court's discussion in *El Paso*,[19] to the effect that certification of one supplier withdraws that market from competition, was made in the context of its discussion of the general character of the interstate pipeline industry where it pointed out how competition within the pipeline industry differs from that generally encountered. Our conclusion as to the absence of any legal impediment to the certification of Texas Gas is reinforced by the language of Section 7(g) of the Natural Gas Act which provides, "Nothing in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company."

The D.C. Circuit in *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 169 F. 2d 881 (1948), and the Sixth Circuit in *Kentucky Natural Gas Corporation* v. *F.P.C.*, 159 F. 2d 215 (1947), both had occasion to review Commission orders authorizing new pipeline suppliers to enter existing markets already served by another supplier. Both courts upheld the Commission's orders on a finding that the Natural Gas Act does not grant an exclusive or perpetual right to serve a market.

Kentucky Natural is particularly relevant.[20] In that case the Mattoon, Illinois area had been served for many years by Central Illinois Public Service Company. CIPSCO received its gas from Kentucky Natural Gas Corporation which, in turn, was supplied by Panhandle Eastern. CIPSCO applied for and was granted a certificate to connect directly to Panhandle, thus replacing Kentucky Natural which had been the sole supplier. In upholding the Commission the court noted that, "The elimination of

[19] That proceeding did not arise as a case under the Natural Gas Act but was an antitrust proceeding involving Section 7 of the Clayton Act.

[20] 159 F. 2d 215 (1947).

an unnecessary middleman between the wholesaler and the retailer is a material benefit to the ultimate consumer at retail."[21]

A natural gas company does not have a permanently fixed or vested interest in its existing markets. It should not be immunized from the forces of competition operative within the natural gas industry. If the overall public interest will be better served by permitting a competing company to supply an existing market it should be permitted to do so.

The parties opposing the new service by Texas Gas to Hamilton also argue that the Commission cannot authorize Texas Gas' construction of $7.8 million in new main-line facilities when Cincinnati Gas has facilities already available to render the same service. There is no question here but that Texas Gas' project is economically feasible. Its revenues will exceed its incremental cost of service (including a 6½% rate of return) by more than $200,000 annually. On this basis, and in light of the considerations expressed above, we will grant a certificate to Texas Gas in accordance with its application.

CONCLUSION

The Commission is required under the Natural Gas Act to act in a manner consistent with the broad concept of the public interest. In attempting under any given circumstance to discern the public interest it is required to assure that adequate gas supplies are made available to consumers at the lowest reasonable rate consistent with the maintenance of adequate service.[22] The concept of public interest and public convenience and necessity are not static. The

[21] See also *Shrewsbury Mun. Light Dept.* v. *New England Power Company, supra.*

[22] *Atlantic Refining Co.* v. *P.S.C.*, 360 U.S. 378 (1959).

factors contributing to their fulfillment are dynamic. This is especially true in an industry which is obliged to compete with other energy sources to expand or even retain its market.

At one time Hamilton's only gas source was through Cincinnati Gas. It has now shown that it can secure a reduction in costs if its future supply is provided by Texas Gas. It has also demonstrated that the detriment to Cincinnati Gas and the customers of Cincinnati Gas is minor and of a diminishing nature and will be completely offset on a netting basis within a two or three-year period. For the reasons expressed herein and in the initial decision, we conclude that the order applied for by Hamilton and the certificate sought by Texas Gas should be granted.

The Ohio Commission, the Columbia Companies and Cincinnati Gas all contend that any certificate authorizing Texas Gas to serve Hamilton should contain a condition precedent requiring Hamilton to secure State authorization for the abandonment of the present service. The record shows that in 1965 Cincinnati Gas brought an action in the Common Pleas Court to enjoin Hamilton from terminating its purchases of gas at the contract expiration date without first obtaining the approval of the Ohio P.U.C. The court ruled that Hamilton had plenary power under the State Constitution to contract for utility services and cannot be restricted in its right by imposing a requirement that it secure State Commission abandonment approval. Denial of the injunction thereafter was upheld in a *per curiam* order by the Ohio Court of Appeals. On October 19, 1966, the Ohio Supreme Court dismissed Cincinnati Gas' appeal on the ground that no substantial constitutional question existed.[23]

[23] Rehearing denied by order issued November 23, 1966.

Petitioners, in seeking such a condition ask, in effect, that through our conditioning power we require Hamilton to obtain abandonment authorization from the State Commission even though this may not be a requirement under the State law. We do not believe that this would be a proper exercise of our power and will not attach such a condition. If the State Commission statutorily and constitutionally has such authority, Hamilton will be required to obtain abandonment authorization; a condition on our part can confer no greater power on the State Commission than already may exist.

The Commission further finds:

(1) The City of Hamilton, Ohio is a municipality engaged in the distribution of natural gas to the public and an applicant herein. It owns and operates its gas distribution system and purchases its natural-gas requirements from The Cincinnati Gas and Electric Company, a public utility under the laws of Ohio, for distribution within the city limits of Hamilton.

(2) Texas Gas Transmission Corporation and The Ohio Fuel Gas Company, applicants in Docket Nos. CP66-13 and CP66-207, respectively, are natural gas companies within the meaning of the Natural Gas Act subject to the jurisdiction of this Commission.

(3) Applicants are able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act and the requirements, rules, and regulations of the Commission thereunder.

(4) Cincinnati Gas is a public utility distribution company selling natural gas and electricity in the southwest corner of Ohio and by virtue of the exemption granted in

February 1955 in Docket No. G-2535, under the provisions of the Hinshaw Amendment to the Natural Gas Act, its gas operations are not now subject to the jurisdiction of this Commission.

(5) The order sought by Hamilton in Docket No. CP65-402, and the construction and operation of the facilities proposed by Texas Gas in Docket No. CP66-13, as amended, are required by the public convenience and necessity subject to the condition, however, that Texas Gas shall not commence service to Hamilton prior to November 1, 1967, and that until such date Hamilton shall continue to purchase its natural gas requirements from Cincinnati Gas at not less than the applicable lawful rate.

The Commission orders:

(A) A certificate of public convenience and necessity is hereby issued to the Texas Gas Transmission Corporation and said Company is hereby directed, pursuant to Section 7(a) of the Act, to sell gas to the City of Hamilton, Ohio, on the conditions set forth herein, authorizing the sale of natural gas in interstate commerce for resale for ultimate public consumption, and for the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, all as more fully described in the applications, as amended.

(B) The certificate herein issued to the Texas Gas Transmission Corporation, Docket No. CP66-13, and the Order pursuant to Section 7(a) of the Act, are subject to the condition that Texas Gas shall not commence service to Hamilton prior to November 1, 1967, and that until such date Hamilton shall continue to purchase its gas requirements from Cincinnati Gas at not less than the applicable lawful rate.

(C) The application of The Ohio Fuel Gas Company in Docket No. CP66-207 is denied.

(D) Except as herein granted, the exceptions to the examiner's decision are hereby denied.

(E) The examiner's decision, to the extent not inconsistent herewith, is hereby adopted as part of this Opinion and Order.

By the Commission.

(SEAL)

JOSEPH H. GUTRIDE,
Secretary.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 99

THE CINCINNATI GAS & ELECTRIC COMPANY, and THE CITY OF CINCINNATI, *Petitioners,*

v.

FEDERAL POWER COMMISSION, THE CITY OF HAMILTON, OHIO, and TEXAS GAS TRANSMISSION CORPORATION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT THE CITY OF HAMILTON, OHIO, IN OPPOSITION

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INDEX

	Page
QUESTION PRESENTED	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	6
Certiorari Is Not Warranted	6
CONCLUSION	17

CITATIONS

COURT DECISIONS:

Atlantic Ref. Co. v. *Public Serv. Comm'n*, 360 U.S. 378 (1959)	8
FPC v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961)	8
Home Gas Co. v. *FPC*, 231 F.2d 253 (D.C. Cir.), *cert. denied*, 352 U.S. 831 (1956)	10
Illinois Central R.R. v. *Norfolk & Western Ry.*, 385 U.S. 57 (1966)	7
Kentucky Natural Gas Corp. v. *FPC*, 159 F.2d 215 (6th Cir. 1947)	10
Panhandle Eastern Pipeline Co. v. *FPC*, 169 F.2d 881 (D.C. Cir.), *cert. denied*, 335 U.S. 854 (1948)	10
United States v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964)	10
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951)	7

FEDERAL POWER COMMISSION DECISIONS:

Atlantic Seaboard Corp., 38 F.P.C. 91 (1967)	13
Shrewsbury Municipal Light Dep't v. *New England Power Co.*, 32 F.P.C. 373 (1964), *aff'd sub nom.*, *New England Power Co.* v. *FPC*, 349 F.2d 258 (1st Cir. 1965)	9

Page

STATUTES AND RULES:

Natural Gas Act

§ 1(c), 15 U.S.C. § 717(c) 14
§ 7(a), 15 U.S.C. § 717f(a) 2, 3
§ 7(c), 15 U.S.C. § 717f(c) 2, 4
§ 7(e), 15 U.S.C. § 717f(e) 8
§ 7(g), 15 U.S.C. § 717f(g) 2, 11

Rules of the Supreme Court of the United States 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1435

THE CINCINNATI GAS & ELECTRIC COMPANY, and THE CITY OF CINCINNATI, *Petitioners,*

v.

FEDERAL POWER COMMISSION, THE CITY OF HAMILTON, OHIO, and TEXAS GAS TRANSMISSION CORPORATION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT THE CITY OF HAMILTON, OHIO, IN OPPOSITION

QUESTION PRESENTED

Was the court below correct in concluding that the Federal Power Commission properly discharged its statutory obligation to protect the overall public interest when it authorized a natural gas distributor, whose non-regulated contract with its middleman distributor-supplier had expired, to obtain a cheaper, fully regulated gas supply directly from an interstate pipe-

line, in circumstances where the substantial and lasting benefits to the ultimate consumer far outweigh possible, minor, and temporary detriment?

STATUTES INVOLVED

Section 7(a) of the Natural Gas Act[1] provides:

> Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged . . . in the distribution of natural or artificial gas to the public. . . .

Section 7(c) of the Natural Gas Act[2] provides:

> No natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts. . . .

Section 7(g) of the Natural Gas Act[3] provides:

> Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

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[1] 52 Stat. 824 (1938), 15 U.S.C. § 717f(a).

[2] 52 Stat. 825 (1938), *as amended*, 56 Stat. 83 (1942), 15 U.S.C. § 717f(c).

[3] 56 Stat. 84 (1942), 15 U.S.C. § 717f(g).

STATEMENT OF THE CASE

Respondent the City of Hamilton, Ohio (Hamilton), is a municipality of approximately 80,000 inhabitants located a few miles north of the City of Cincinnati (Cincinnati). Hamilton operates its own natural gas distribution system and, for many years, has purchased its gas supply from petitioner The Cincinnati Gas & Electric Company (CG&E), which serves Cincinnati and environs. In fact, Hamilton is the only gas distributor—municipal or private—in the entire State of Ohio which has been required to purchase its supply from another distributor.

On June 16, 1965, Hamilton, anticipating the expiration of its supply contract with CG&E, filed an application with the Federal Power Commission (FPC or Commission) under Section 7(a) of the Natuarl Gas Act.[4] The application sought a Commission order directing Texas Gas Transmission Corp. (Texas Gas) to establish a connection and to sell and deliver Hamilton's future gas requirements. Hamilton's decision to file its application followed a series of investigations regarding alternate sources of supply which would become available upon the expiration of its contract with CG&E. In this regard, inquiries were made of Texas Gas, whose main transmission line crosses through Hamilton on the southeast, of Texas Eastern Transmission Corp., whose main line passes just north of Hamilton, and of Ohio Fuel Gas Company (Ohio Fuel), one of CG&E's suppliers. During the same period, Hamilton also negotiated extensively with CG&E, on the basis of whose last firm offer for continued service this case was tried before the Commission.

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[4] Quoted in pertinent part, *supra*, p. 2.

On July 15, 1965, Texas Gas sought Commission certificate authorization under Section 7(c) of the Act[5] to construct the facilities required to provide service to Hamilton. Additionally, on December 23, 1965, Ohio Fuel applied for authority to construct facilities to deliver gas directly to Hamilton, but conditioned its application upon a final Commission determination that Hamilton should not continue to be supplied by CG&E. Thus, Ohio Fuel supported continued service to Hamilton by CG&E, but purported to offer a competitive service *vis a vis* Texas Gas.

The three proposals to serve Hamilton thereby presented to the Commission were consolidated for hearing and decision (R. 2272) and were made the subject of three days of hearings in March, 1966. Subsequently, on August 8, 1966, the presiding examiner issued his initial decision (Pet. App. 30-49;[6] 37 F.P.C. 221-29; R. 2391-2404), in which he rejected CG&E's proposal for continued service and denied the competitive application filed by Ohio Fuel. In approving the Hamilton-Texas Gas project, the examiner found, *inter alia,* that the substantial benefits to Hamilton and its customers of a lower-cost gas supply from Texas Gas will not be outweighed "in the scales of the public interest" by any adverse impact upon CG&E, its suppliers, and their customers (Pet. App. 36-41, 48-49).

Thereafter, in Opinion No. 513 issued January 24, 1967 (Pet. App. 50-68; 37 F.P.C. 209-20; R. 2614-27), the Commission affirmed the examiner's initial decision and approved the Hamilton-Texas Gas project, con-

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[5] Quoted in pertinent part, *supra,* p. 2.

[6] The petition for writ of certiorari filed herein has been abbreviated "Pet.".

cluding that Hamilton and its customers will realize significant economic savings and benefits from the change of source of the Hamilton gas supply to Texas Gas (Pet. App. 54-56); that the lower commodity rates available from Texas Gas will enable Hamilton to make increased industrial sales, thereby reducing considerably its average cost of all purchased gas and, consequently, enabling it to pass on further cost savings to consumers (*Id.*, 55-56); that the economic advantages to be derived from the Hamilton-Texas Gas project are not outweighed by any economic detriment—found to be of a minor and diminishing nature—which might be sustained by CG&E, its suppliers, or their customers (*Id.*, 57-61); that the ability of CG&E and its suppliers to continue rendering service to their customers will not be affected significantly by the switch of the Hamilton load to Texas Gas (*Id.*, 54, 57-61, 65); that elimination of CG&E as an unnecessary middleman supplier for the Hamilton market will best serve the overall public interest by making available to consumers in Hamilton a direct, lower-cost supply of pipeline gas (*Id.*, 62-64); and that the diminished usefulness of the facilities presently utilized by CG&E to serve Hamilton will be short-lived and will not place any undue burden upon CG&E's remaining customers (*Id.*, 60-61). By order issued March 24, 1967 (37 F.P.C. 598-601; R. 2665-69), the Commission denied applications for rehearing and to reopen the proceedings.[7]

On review of the Commission's orders, the Sixth Circuit, in an opinion and order entered February 16, 1968

[7] Service by Texas Gas to Hamilton was in fact initiated during January, 1968, and Hamilton's rates to its customers have been lowered to effect savings amounting to some $200,000 annually.

(Pet. App. 19-29; 389 F.2d 272-77), affirmed the Commission. The court expressly concluded that the findings by the Commission were supported by substantial evidence; and that those findings had a reasonable basis, were not arbitrary, and reflected a correct application of the pertinent rules of law (Pet. App. 28). In so concluding, the court stated, *inter alia,* that Hamilton should not "be deprived of the opportunity to purchase gas at a lower rate and thereby benefit its own customers when CG&E's customers were not substantially adversely affected." (*Id.,* 26) Moreover, the court noted that the Commission's orders effectively substituted a direct gas supplier (Texas Gas) in place of an unnecessary middleman supplier (CG&E), which "is a material benefit to the ultimate consumer at retail." (*Id.,* at 27-28)

Petitioners seek review of the court's opinion and order. However, Ohio Fuel, one of the petitioners in the Sixth Circuit, does not here seek review of the action below in denying its own competitive proposal.

ARGUMENT

Certiorari Is Not Warranted

The petition does not set forth any special and important reasons which would justify the exercise by this Court of its jurisdiction on writ of certiorari.[8] At most, petitioners attempt only to invoke that jurisdiction in order to advance, once again, the same position which has been fully aired before the FPC's presiding examiner, the entire Commission, and the Sixth Circuit. The petition fails to show that the respective

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[8] See, *e.g.,* Rules 19(1)(b), 23(1)(h), and 23(4) of the Rules of this Court.

determinations below are arbitrary or unreasonable, unsupported by substantial evidence in the record[9], or in any other manner a departure from the accepted course of administrative and judicial proceedings. Moreover, no demonstration is made of a conflict between circuits or with the decisions of this Court, or of an important federal question, or, in fact, of any other matter necessitating review on certiorari.

1. *The Commission's methodology.* The primary contention by petitioners is that the Commission, in certificating the Texas Gas supply for Hamilton, accorded a "preference" to one group of natural gas consumers (*i.e.*, Hamilton's customers) at the expense of another group of consumers (*i.e.*, the remaining customers of CG&E and its suppliers). The claim, reduced to its essentials, consists of an alleged use by the Commission of inconsistent standards in evaluating the respective economic benefits and detriments to consumers which would result from authorizing the new source of supply. More specifically, petitioners point out that, in measuring the potential loss in operating revenues which would be incurred by CG&E and its suppliers by losing the Hamilton load, the Commission considered the extent to which this loss would be offset by future increases in sales by those companies to other customers; and consideration of such offsetting growth in other sales, petitioners contend, results in "camouflaging" the resulting detriment because this "doesn't

[9] In this regard, the requirement of substantial evidence is fully met if, on the whole record, it appears that the Commission *reasonably* could have made the findings and conclusions which in fact were made. *Illinois Central R.R.* v. *Norfolk & Western Ry.*, 385 U.S. 57, 69 (1966); *Universal Camera Corp* v. *NLRB*, 340 U.S. 474 (1951).

account for the actual impact of the loss" upon the existing suppliers and their customers (Pet. 9-10).

Petitioners' contention, however, ignores the basic function of the Commission's inquiry in a certificate proceeding. In certificating any proposed project the Commission is required to find, under the provisions of the Act, that the project is "required by the present or future public convenience and necessity".[10] This broad Congressional mandate, besides reposing considerable administrative discretion in the Commission, "connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination."[11] Offsetting load growth along CG&E's facilities now serving Hamilton, as well as offsetting load growth in CG&E's system generally, constitute factors which materially affect the cost of gas to the ultimate consumer, and were appropriate for consideration by the Commission.[12] Indeed, the consideration of those factors was not at all "preferential"; rather, it was fully consistent with the Commission's statutory responsibility to reflect due regard for the overall public interest — and the court below so held (Pet. App. 26-27).

Equally without merit—and in fact wholly inaccurate—is petitioners' claim that the Commission regarded offsetting growth as the controlling or sole

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[10] Natural Gas Act § 7(e), *added by* 56 Stat. 84 (1942), 15 U.S.C. § 717f(e).

[11] *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 23 (1961).

[12] Interestingly, petitioners themselves point out that the Natural Gas Act is designed "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." (Pet. 6) See *Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378, 388 (1959).

determinant for public convenience and necessity in this proceeding (Pet. 6-9). In answering this same contention made in the court below, the Sixth Circuit stated, *inter alia* (Pet. App. 26):

> While we do not believe this should be the sole criterion, we think it was one of the factors which the Commission had a right to consider.

Petitioners' jaundiced view of the Commission's methodology ignores the fact that the Commission gave consideration to such other pertinent criteria as the negligible revenue loss, if any,[13] which would be suffered by CG&E and its customers even *absent* offsetting growth (Pet. App. 58-60), the economic benefits to all customers of Texas Gas, including Ohio Fuel (37 F.P.C. 600, R. 2668), the continued usefulness of existing facilities (Pet. App. 60-61), the public interest benefit derived from eliminating unnecessary middleman suppliers (*Id.*, 62-64), the economic feasibility of the Texas Gas project (*Id.*, 64), and the advantage of a gas supply subject to effective rate regulation (*Id.*, 37-38).

Moreover, petitioners' reliance on the *Shrewsbury* case[14] in support of their view is misplaced. In that case, the Commission measured the net reduction in the revenues of the existing supplier as a result of the involved market loss, evaluated the actual impact of that reduction upon the supplier's net operating income, and found this to be too small to have any significant effect upon the rates which would be charged its remaining customers. The Commission's approach in the present case is entirely consistent with that taken

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[13] At most, $12,002 annually; see discussion at pp. 12-13, *supra*.

[14] *Shrewsbury Municipal Light Dep't.* v. *New England Power Co.*, 32 F.P.C. 373 (1964), *aff'd sub nom., New England Power Co.* v. *FPC*, 349 F.2d 258 (1st Cir. 1965).

in *Shrewsbury*. In both cases the Commission focused on the actual consumer impact of the change in suppliers. Indeed, the basic inquiry was directed to the overall interest of *all* consumers—including in the present context those consumers in Hamilton, as well as those who will continue to be served by CG&E and its suppliers.

In an attempt to lend credence to their claim of "preference", petitioners contend that the action below departs from an "almost universal" FPC practice of protecting existing gas markets (Pet. 10-11). However, the two cited examples[15] of that alleged "universal" practice simply do not deal with the question whether, as a matter of regulatory policy, substitution should be allowed for existing loads. Rather, they involve substitution of suppliers seeking to serve incremental loads within market areas served by others. Moreover, a third case (which petitioners concede is part of the relevant "universe") squarely approved a substitution of gas suppliers for a complete market load in a particular area.[16]

Further, although the reason for petitioners' reference (Pet. 11) to the opinion of this Court in *El Paso*[17] is not at all clear, the attempted inference appears to be that, once consumers in an area are committed to a particular gas supply, the Commission is effectively precluded from ever certificating service by a new supplier except for incremental sales. However, the very

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[15] *Home Gas Co.* v. *FPC*, 231 F.2d 253 (D.C. Cir.), *cert. denied*, 352 U.S. 831 (1956); *Panhandle Eastern Pipeline Co.* v. *FPC*, 169 F.2d 881 (D.C. Cir.), *cert. denied*, 335 U.S. 854 (1948).

[16] *Kentucky Natural Gas Corp.* v. *FPC*, 159 F.2d 215 (6th Cir. 1947).

[17] *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

passage quoted by petitioners expressly is premised on the existence of "distribution *contracts*";[18] in the present case, there is no contract in existence, this having expired in September, 1966. Moreover, the *El Paso* case involved an antitrust action under Section 7 of the Clayton Act, rather than a public convenience and necessity case under Section 7 of the Natural Gas Act. Petitioners would twist a comment by this Court regarding the general nature of competition in the pipeline industry, as contrasted with other lines of business, into a prohibition against the very type of expansion contemplated by the Natural Gas Act. That there is no legal impediment to the substitution of one gas supplier for another in an appropriate case, as here, is made clear by Section 7(g) of the Act[19] which confers upon the Commission the power "to grant certificates of public convenience and necessity *for service of an area already being served by another natural gas company.*" (Emphasis added)

Plainly, petitioners do not show that the Commission's determination in the present case is in derogation of its responsibilities to natural gas consumers. To the contrary, the views urged in the petition are unduly restrictive of the Commission's duties and powers under the Natural Gas Act, and should be rejected out of hand.

2. *Economic impact on CG&E.* Concerning the Commission's finding that CG&E would suffer only a *de minimus* loss by the switch of suppliers, petitioners simply resort to argument that the record will support a different figure as the measure of their loss (Pet. 12-13). Those arguments were fully presented to the

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[18] *Id.*, at 660 (emphasis added).

[19] Quoted in full, *supra*, p. 2.

examiner and the Commission, and were rejected (Pet. App. 38-41, 58-61). No allegation is made that the Commission's factual findings rejecting those arguments are unsupported by substantial evidence, or that the court's finding that they were supported by substantial evidence (Pet. App. 28) was in error. Petitioners merely seek a fresh forum for *de novo* consideration of their case-in-chief, which is patently beyond the scope of certiorari.

Significantly, under the rates proposed by CG&E itself for service to Hamilton, the record shows that the rate of return to CG&E would be entirely inadequate (R. 244, 344-46). As the Commission found, CG&E would receive *gross* revenues of only $12,002 annually above its purchased gas costs, which revenues would be $148,000 short of meeting CG&E's cost of service to Hamilton, including a six per cent rate of return.[20] Thus, even if the loss to CG&E were measured by the amount of its gross revenues from the Hamilton sale, this loss would be *de minimus*. At best, it would be on the order of $120,000 over a ten-year period, rather than the $2.4 million claimed by petitioners.

The petition raises only two purported objections to the Commission's $12,002 gross revenue figure. First, petitioners contend that, due to existing contract obligations, CG&E will be required "to pay demand charges for gas which it can't use" (Pet. 12). However, to the extent that CG&E may have been bound to such contract provisions, it subsequently has been relieved

[20] Pet. App. 58-59. The arithmetic and record support underlying the Commission's figures are detailed in Supp. B to Brief of Joint Petitioners, filed in the court below.

from them by the Commission.[21] Further, petitioners' contention ignores the factual finding that any loss to CG&E through Hamilton's change in suppliers "will shortly be offset by an increase in Cincinnati Gas' other sales" (Pet. App. 60). In fact, the record shows (R. 939-40), the presiding examiner found (Pet. App. 39-40), the Commission concluded (*Id.*, 59), and the Sixth Circuit agreed (*Id.*, 25-26) that CG&E's increased sales to its other customers will be made at a better load factor than the sale to Hamilton, so that CG&E's system load factor will become higher, and its unit cost of gas lower, by losing the Hamilton load, to the actual *benefit* of CG&E's existing customers.

Petitioners' remaining objection to the $12,002 figure is that it "is based on an average of purchase gas costs" (Pet. 12). However, the court below found the Commission's use of average costs was proper (Pet. App. 24), and no reason is presented to disturb that finding. Petitioners' own evidence before the Commission does not (and, indeed, could not) trace back to CG&E's respective sources of supply the specific gas volumes which were sold to Hamilton.

3. *Effective rate protection for Hamilton.* Petitioners dispute (Pet. 13-15) the finding by the court below that "considerable doubt" exists whether a continued supply arrangement between Hamilton and CG&E would be subject to any jurisdiction by the Public Utilities Commission of Ohio (Pet. App. 24-

[21] *Atlantic Seaboard Corp.*, 38 F.P.C. 91 (1967). It is interesting to note that CG&E presently is active before the Commission in efforts to obtain additional firm sources of gas supply; see FPC Dockets CP66-205, The *Cincinnati Gas & Electric Co.*, and CP66-285, *Texas Gas Transmission Corp.*

25).[22] Not only did the court accurately appraise the present state of the law in this area, but, more importantly, even if it could be concluded that the Ohio Commission does possess jurisdiction, the fact remains that it never has exercised such jurisdiction; over the years, it merely has accepted CG&E's contract with Hamilton for filing, without making any determination of the reasonableness of the rate involved. Petitioners' inferences (Pet. 13-14) that Hamilton has sought to defer Ohio court consideration of this matter are unfounded.[23] Furthermore, the absence of any effective regulation by the Ohio Commission is illustrated by the alarming variation in the rate offerings made by CG&E to Hamilton shortly before, and during, the pendency of this case before the Commission.[24]

Strangely, on the one hand, petitioners allege there is "nothing significant" in CG&E's unwillingness to commit itself to the rates offered Hamilton beyond November 1, 1969. On the other hand, petitioners admit that any rate "as close to cost as CG&E's reduced rate to Hamilton" would require considerable care "about the future and its unknowns." (Pet. 14) Under the circumstances, Hamilton clearly is justified in its fear that CG&E's rates are not likely to be as

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[22] The CG&E-Hamilton sale is not subject to *FPC* regulation by virtue of CG&E's "Hinshaw" exemption from the provisions of the Natural Gas Act. See R. 2626; see also Natural Gas Act § 1(c), 68 Stat. 36 (1945), 15 U.S.C. § 717(c).

[23] The Ohio Supreme Court, *sua sponte*, removed the matter from its hearing calendar; subsequently, CG&E and Hamilton agreed to an indefinite postponement pending CG&E's appeal of the FPC decision involved here. The Ohio court's action was prompted by the fact that the question of Ohio Commission jurisdiction over the CG&E-Hamilton sale presently is *moot*, and will remain moot if the Sixth Circuit's decision is allowed to stand.

[24] *E.g.*, R. 84, 99, 121.

stable as those of Texas Gas, and the court below properly so found (Pet. App. 25). Even petitioners state that, if CG&E chose to "break faith" with its offered rate, Hamilton then would have available to it the remedy of "requesting FPC to authorize it a Texas Gas supply" (Pet. 14)—a virtual admission that, absent a pending Section 7(a) proceeding, Hamilton's "bargaining power" *vis a vis* CG&E is sorely limited. Manifestly, the petition does not disclose any impropriety in the Commission's having considered the benefits that would flow to Hamilton consumers through obtaining effective protection against excessive rates and charges.

4. *Loss of CG&E rate reductions.* Petitioners contend, *ipse dixit,* that, if Hamilton were retained by CG&E as a customer, "the sales units would be increased and accordingly rates could be reduced" (Pet. 15). However, the alleged loss to CG&E's customers of possible rate decreases is wholly unsupported in fact. CG&E has made no showing that any rate reductions would attend its retention of the Hamilton load; and the court below properly rejected its general allegations of such possible reductions (Pet. App. 26).[25]

Petitioners' implicit generalization that, in any case, a reduction of growth by removing existing business results in a loss of rate decreases is, when applied to the situation here, totally inapt. Rate decreases hardly can be generated by making sales at less than a fair rate of return or at a loss. As already pointed out, continuation of CG&E's sale to Hamilton would provide that company with far less than a fair rate of

[25] Likewise, CG&E presented no evidence of a possible rate increase that might attend loss of the Hamilton load, and the examiner, the Commission, and the court below found that no such increase would be required (Pet. App. 26, 40-41, 60).

return. However large and however long continued, such a sale could never result in a rate decrease either to Hamilton or to CG&E's other customers. To the contrary, CG&E's offered rate was so low in terms of CG&E's costs as to warrant concern that a rate *increase* to Hamilton would be "inevitable".[26]

5. *Unnecessary middleman supplier.* Petitioners object to the finding that CG&E is an unnecessary middleman supplier of gas to Hamilton; they state that, although CG&E "may be a middleman, it is certainly not an unnecessary middleman" (Pet. 16). But this position ignores an economic fact of life—recognized by the Commission and the court below—that CG&E, as an intermediate distributor-supplier, cannot offer rates even approaching those of Texas Gas. As a factor which materially affects the cost of gas to the ultimate consumer, CG&E's middleman status was appropriate for consideration by the Commission. Upon weighing all relevant factors, the Commission concluded that the overall public interest requires replacement of the intermediate supplier by a direct pipeline source of supply for Hamilton (Pet. App. 63-65).

6. *Economic impact on CG&E's suppliers.* Finally, petitioners complain of the finding that the Hamilton-Texas Gas project will have "no significant impact" upon CG&E's suppliers or their customers. Again, however, petitioners simply attempt to argue that the evidence supports a different measure of the loss (see pp. 11-12, *supra*); they do not demonstrate any error with respect to the finding which was made.[27]

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[26] R. 121-22, 345. CG&E's own witness agreed that its rate of return would be inadequate under its proposed rate (R. 244).

[27] Significantly, as already noted, CG&E's suppliers (which were petitioners in the court below) have not asked this Court to review the opinion and order of the Sixth Circuit.

The record compels the conclusion that petitioners' calculations of the economic impact upon CG&E's suppliers are "inflated". They properly were rejected as such by the Commission (37 F.P.C. 599; R. 2666), which rejection the court below found to have been supported by substantial evidence. The fallacy in petitioners' loss calculations is that they assume the volume of CG&E's initial cutback in gas purchases from its suppliers would remain constant in the future. However, as already discussed, the reduced volume of sales made by CG&E after losing the Hamilton load would be offset by increased sales by CG&E to its other customers. Those increased sales correspondingly will reduce CG&E's cutback on its suppliers and, thus, will reduce any potential losses. The Commission was reasonable in concluding, upon the evidence adduced, that the *actual* impact of CG&E's cutback on its suppliers would be minimal.

CONCLUSION

For these reasons the petition for writ of certiorari should be denied.

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June 13, 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 99

THE CINCINNATI GAS & ELECTRIC COMPANY AND THE CITY OF CINCINNATI, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

BRIEF OF RESPONDENT, TEXAS GAS TRANSMISSION CORPORATION, IN OPPOSITION

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT—CERTIORARI SHOULD BE DENIED	4
CONCLUSION	7
CASES:	
Atlantic Refining Co. v. Federal Trade Commission, 381 U.S. 357 (1965)	7
Cincinnati Gas & Elec. Co. v. Federal Power Comm'n., 376 F.2d 506 (6th Cir. 1967)	5
F.P.C. v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961)	6
N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111 (1944)	7
Unemployment Compensation Commission v. Aragan, 329 U.S. 143 (1946)	7
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951)	5
STATUTES:	
Natural Gas Act, Sec. 7(a) (15 U.S.C. § 717f(a), 52 Stat. 824 (1938))	2, 3
Sec. 7(c) (15 U.S.C. § 717f(c), 52 Stat. 825 (1938), as amended. 56 Stat. 83 (1942))	2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1435

THE CINCINNATI GAS & ELECTRIC COMPANY AND THE CITY OF CINCINNATI, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

BRIEF OF RESPONDENT, TEXAS GAS TRANSMISSION CORPORATION, IN OPPOSITION

Respondent, Texas Gas Transmission Corporation (Texas Gas) respectfully submits that the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit filed herein should be denied.

QUESTION PRESENTED

Did the Court below correctly affirm an order of the Federal Power Commission (Commission) where there was a substantial evidentiary basis for the findings and conclusion in support of the Commission's order directing Texas Gas to serve the natural gas requirements of the City of Hamilton, Ohio?

STATUTES INVOLVED

Section 7(a) of the Natural Gas Act[1] provides:

> Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged . . . in the distribution of natural or artificial gas to the public . . .

Section 7(c) of the Natural Gas Act[2] provides:

> No natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts . . .

STATEMENT OF THE CASE

Texas Gas is a major interstate natural gas pipeline subject to regulation in its natural gas wholesale and transmission activities by the Commission under the Natural Gas Act. Texas Gas' pipeline facilities pass in the vicinity of Hamilton, Ohio.

The City of Hamilton operates its own municipal gas distribution system. Hamilton serves approximately 20,000 natural gas customers. For many years its gas requirements had been purchased directly from Cin-

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[1] 52 Stat. 824 (1938), 15 U.S.C. § 717f(a).

[2] 52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942), 15 U.S.C. § 717f(c).

cinnati Gas & Electric Company (CG&E), which is, primarily, a distribution company itself, serving the nearby city of Cincinnati, Ohio and environs. Hamilton was CG&E's only wholesale customer and Hamilton's annual purchases accounted for approximately five percent (5%) of CG&E's market. The then effective contract between CG&E and Hamilton was terminable, upon proper notice. CG&E gave notice to Hamilton of termination of this contract, according to its terms, on September 3, 1966.

When Hamilton and CG&E were unable to agree upon a contract acceptable to both parties, for service subsequent to September 3, 1966, Hamilton sought natural gas service from Texas Gas by filing an application under Section 7(a)[3] of the Natural Gas Act seeking an order directing Texas Gas to sell gas to the City. Subsequently, Texas Gas filed an application under Section 7(c)[4] of the Natural Gas Act for authority to construct and operate the required facilities contingent upon the Commission's finding that the rendition of the service requested by Hamilton would be in the public interest. There was no issue in the proceedings before the Commission with respect to the Texas Gas application as such. The hearing examiner found:

> "The evidence introduced by Texas Gas in support of its application is uncontroverted; all parties having waived cross-examination of its witnesses. The facilities proposed are adequate to render the service requested by Hamilton; costs are reasonable; reserves adequate; and the project presents no problems as to engineering, financing, markets, or economic feasibility." (R. 512)

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[3] Supra, p. 2.

[4] Supra, p. 2.

The Commission adopted the Examiner's findings and found, additionally, that Texas Gas' service to Hamilton would provide benefits for Texas Gas' other customers, as well as for the City of Hamilton (R. 534).

The controversy in the proceedings before the Commission centered on the question of whether Hamilton should be permitted to purchase its then existing gas requirements from Texas Gas or whether it should be required to continue to obtain them from CG&E. A third alternative was whether Hamilton's requirements should be obtained directly from Ohio Fuel Gas Company, a supplier of CG&E. The Commission found that it was in the public interest for Texas Gas to render the service requested by Hamilton. Thus, it directed Texas Gas to sell gas to Hamilton in volumes up to 37,550 Mcf[5] per day. In connection therewith, the Commission authorized the construction and operation of the facilities set forth in Texas Gas' application which were estimated to cost $7,816,000 (R. 526).

Petitioner did not seek a stay of the Commission's order either from the Commission or from the court below. The Texas Gas pipeline facilities, which the Commission authorized, have been constructed. Hamilton has been receiving service from Texas Gas since the early part of January, 1968, pursuant to the authorization and direction of the Commission.

ARGUMENT

CERTIORARI SHOULD BE DENIED

The petition does not set forth any basis for the issuance by this Court of the writ of certiorari. Petitioner does not contend that the decision below gives rise to

[5] 1000 cubic feet at a pressure base of 14.73 pounds per square inch absolute.

a conflict between circuits, or that an important federal question is involved. Nor does Petitioner contend that the record is devoid of substantial evidence to support the Commission's findings and conclusion.

Petitioner doesn't even contest the affirmative finding of the Court below (389 F. 2d 277 (1968)) that there was, in fact, substantial evidence to support the findings of the Commission:

> "We find that there was substantial evidence to support the findings of fact of the Commission. They are binding on us. 15 U.S.C. § 717r(b); *Universal Camera Co.* v. *N.L.R.B.*, 340 U.S. 474 (1951); *Cincinnati Gas & Elec. Co.* v. *Federal Power Comm'n*, 376 F. 2d 506 (6th Cir. 1967)."

Petitioner merely seeks to reargue, *de novo*, the case which it, heretofore, presented to the Commission. Petitioner's principal contention before this Court, as it was in the court below, is that the Commission's decision authorizing and directing Texas Gas to sell natural gas to Hamilton is erroneous because it (the Commission) did not properly weigh or balance the resulting adverse impact on CG&E, its consumers and their supplier. Obviously, however, this is a matter which falls within the administrative expertise of the Commission.

As correctly noted by the Court below (389 F. 2d 274 (1968)) there is no dispute about the fact that Texas Gas will provide Hamilton with the lowest cost gas supply. The extent of the benefits to Hamilton and its consumers was measured by calculating Hamilton's expenses and revenues on the assumption that Texas Gas supplies are substituted for CG&E supplies. Petitioners concede this was proper (Pet. 7).

The Petitioner, CG&E, presented adverse impact evidence in the proceeding before the Commission. On the basis of this evidence, Petitioners contend that the resulting adverse impact on CG&E, its consumers and their supplier, outweighs the admitted cost advantages to Hamilton and its consumers from the Texas Gas supply (Pet. 12, 17, 18). Both the trial examiner and the Commission carefully considered CG&E's impact evidence (Pet. App. 53B, 57B-60B, R. 517-518, 531-532) but, on the basis of the entire record, both reached conclusions adverse to Petitioner's contentions.

Further, Petitioner has proceeded upon the mistaken assumption that "... the issue was resolved completely on the basis of economic impact ..." (Pet. 18). This is just not so. The Commission did not reach its decision *solely* on the basis of economic impact. It took into account many other factors such as a concern that the rate from CG&E to Hamilton may not be regulated (Pet. 52B). In this connection, the Commission noted that the rates being offered by CG&E would not meet the cost of rendering the service (Pet. 59B). The Commission also specifically pointed to the fact that Hamilton is the only gas distributor in the State of Ohio which buys its natural gas supply from another gas distributor and does not have a direct source of gas supply from an interstate pipeline (Pet. 62B). A consideration of these, and the other factors relied upon by the Commission, was proper. *F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 23 (1961).

It is clearly not the function of the reviewing court to consider, *de novo*, the record before the administrative agency and make new findings or substitute its evaluation of the record for the Commission's determinations.

A reviewing court need not find that the Commission's ultimate conclusion is the only reasonable one, or even that it is the result which this Court would have reached had the question arisen, in the first instance, in a judicial, rather than an administrative, proceeding. As this Court has held, once it has been determined that the Commission's findings and ultimate conclusions have "warrant in the record" and a "reasonable basis in law," the responsibility of the reviewing court is at an end. *Atlantic Refining Co.* v. *Federal Trade Commission,* 381 U.S. 357, 367-368 (1965); *Unemployment Compensation Commission* v. *Aragan,* 329 U.S. 143, 154-155 (1946); *N.L.R.B.* v. *Hearst Publications, Inc.* 322 U.S. 111, 131 (1944).

CONCLUSION

WHEREFORE, it is respectfully submitted that the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the 6th Circuit entered herein on February 16, 1968 should be denied.

Respectfully submitted,

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SUPREME COURT, U. S.

No. 90

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OCTOBER TERM, 1968

THE CINCINNATI GAS & ELECTRIC COMPANY AND THE CITY OF CINCINNATI, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	2
Argument	5
Conclusion	11

TABLE OF CITATIONS

Cases:

Atlantic Seaboard Corp. v. *Federal Power Commission*, C.A. 4 No. 11404, decided June 12, 1968 (not yet reported) 9

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*, 386 U.S. 129 9

Central Illinois Public Service Co. v. *Panhandle Eastern Pipe Line Co.*, 4 FPC 1043, affirmed *sub nom. Kentucky Natural Gas Corp.* v. *Federal Power Commission*, 159 F. 2d 215 ..... 7, 8, 10

Home Gas Co. v. *Federal Power Commission*, 231 F. 2d 253, certiorari denied, 352 U.S. 831 8

Lynchburg Gas Co. v. *Federal Power Commission*, 336 F. 2d 942 7

Panhandle Eastern Pipe Line Co. v. *Federal Power Commission*, 219 F. 2d 729, certiorari denied, 349 U.S. 945 8

Permian Basin Area Rate Cases, S.Ct. Nos. 90, *et al.*, O.T. 1967, issued May 1, 1968 5

Shrewsbury Municipal Light Department v. *New England Power Co.*, 32 FPC 373, affirmed *sub nom. New England Power Co.* v. *Federal Power Commission*, 349 F. 2d 258 ..... 7, 8, 10-11

Tennessee Gas Transmission Co., 14 FPC 544, affirmed *sub nom. Home Gas Co.* v. *Federal Power Commission*, 231 F. 2d 253, certiorari denied, 352 U.S. 831 7

United States v. *El Paso Natural Gas Co.*, 376 U.S. 651 ..... 8, 9

Statute: Page

Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w:

Section 4(b), 15 U.S.C. 717c(b) 4
Section 7(a), 15 U.S.C. 717f(a) 2
Section 7(c), 15 U.S.C. 717f(c) 3
Section 19(b), 15 U.S.C. 717f(b) 2

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 99

THE CINCINNATI GAS & ELECTRIC COMPANY AND THE CITY OF CINCINNATI, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-28) is reported at 389 F. 2d 272. The order of the Commission (Pet. App. 50-68) is reported at 37 FPC 209 and the decision of the presiding examiner (Pet. App. 30-49) at 37 FPC 221. The Commission's order denying rehearing (J.A. 538-542) is reported at 37 FPC 598.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29) was entered on February 16, 1968, and the petition for certiorari was filed on May 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission acted properly in permitting a wholesale gas purchaser to divert its entire future gas supply from its present supplier, on the basis of the Commission's determination that the new supplier will deliver gas at a substantially lower cost and that the over-all economic benefits to the consumers served by the purchaser outweigh the minor detriment to the existing supplier and its other customers.

STATEMENT

The City of Hamilton, Ohio (Hamilton), operates a natural gas distribution system. Prior to this proceeding, it obtained its entire gas supply from the Cincinnati Gas & Electric Company (CG&E). CG&E in turn obtained substantially all of its gas from Ohio Fuel Gas Company (Ohio Fuel) and Kentucky Gas Transmission Corporation (Pet. App. 20). On June 16, 1965, Hamilton applied to the Commission under Section 7(a) of the Natural Gas Act, 15 U.S.C. 717f(a), for permission to purchase all of its requirements from Texas Gas Transmission Corporation

(Texas Gas) at the termination of its contract with CG&E.[1] Texas Gas correspondingly applied under Section 7(c) of the Act, 15 U.S.C. 717f(c), for authorization to build the facilities required to serve Hamilton. In addition, Ohio Fuel filed a competing application to serve Hamilton directly if the Commission found that CG&E should not continue to serve the load (Pet. App. 51-53).

The examiner found, and the Commission agreed, that it was in the public interest to permit Hamilton to switch its business to Texas Gas. The Commission found that under a Hamilton-Texas Gas contract, Hamilton and its customers would save approximately $2 million over a ten-year period because of Texas Gas' lower charges, and further found that the lower commodity rate offered by Texas Gas would enable Hamilton to generate additional industrial sales amounting to about 3.1 million Mcf annually, thereby substantially improving its load factor and further reducing the unit cost of purchased gas (Pet. App. 54-56).[2] The Commission also found that the lower-cost supply by Texas Gas would enable Hamilton to attract new industry (Pet. App. 56).

The Commission also, of course, considered the effects of the shift on Hamilton's suppliers. In the course of this inquiry, the Commission noted that sales to Hamilton constitute only 5% of CG&E's market, and that Hamilton is its only wholesale customer

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[1] The arrangement between Hamilton and CG&E was not regulated by the Commission (Pet. App. 52).

[2] The "load factor" is the ratio of average daily purchases for the year to contract entitlement.

(Pet. App. 53). The loss of the Hamilton sale would, at the rate proffered for its gas sales, reduce GC&E's gross revenues by only $12,002, over and above the cost of purchased gas. Moreover, these revenues were in fact $148,000 *short* of meeting CG&E's fully-distributed annual cost of supplying Hamilton (Pet. App. 58-59).[3] The Commission also found that CG&E would shortly make up for the loss of the Hamilton load by growth at better load factors (with a resulting reduction in the average cost of gas to CG&E),[4] and that the facilities CG&E claimed would be idled by the changeover would be utilized (except for some metering stations Hamilton had offered to buy) in serving two other growing communities nearby (Pet. App. 59, 60-61). Finally, the Commission determined that the cutback on Ohio Fuel would be small, with a reduction in fixed cost coverage of only $18,600 (Pet. App. 61) and that Ohio Fuel's competing proposal to

---

[3] Petitioners suggest (Pet. 12-13) that the Commission erred in using the average cost of gas to arrive at these conclusions, rather than attributing to the Hamilton sale the cost of certain low-priced supplies CG&E sought to obtain from Texas Gas. The court below properly rejected this claim (Pet. App. 24), noting, *inter alia*, that the Commission's approach of rolling in gas costs reflected an appropriate regulatory inhibition against granting preferences to individual customers or classes of customers by a supplier's special allocation of low cost gas to them, rather than proportionally to all customers. See 15 U.S.C. 717c(b).

[4] The Commission found that while CG&E would experience a small short-term rise in its average cost of purchased gas in the first year—.04 cents per Mcf—CG&E's average purchased gas costs would, by 1969, decline by .13 cents per Mcf below the level that obtained with Hamilton connected (Pet. App. 59).

serve Hamilton was not nearly as sound and economical as service by Texas Gas promised to be (Pet. App. 61-62). In these circumstances the Commission approved the Hamilton-Texas Gas proposal. On review sought by CG&E, the City of Cincinnati, Ohio Fuel, and Kentucky Gas Transmission, the Court of Appeals for the Sixth Circuit affirmed (Pet. App. 19-29).

ARGUMENT

Petitioners in this Court raise objections to the Commission's order that reflect their disagreement with the significance attributed by the Commission to certain findings of fact. Under traditional standards governing the respective responsibilities of administrative agencies and reviewing courts, the Commission's evaluation of the relative consequences of the supplier switch, sustained by the court of appeals,[5] does not warrant further review. Cf. *Permian Basin Area Rate Cases* (Nos. 90 *et al.*, May 1, 1968) (slip op. p. 14).

1. In determining that Hamilton should be permitted to obtain gas from a different supplier, the Commission contrasted the benefits to Hamilton and its customers, with the consequences for the existing supplier, CG&E, and its suppliers and customers. This evaluation showed that even under the latest rate offer made by CG&E,[6] Hamilton would be able to reduce

---

[5] The court below found that all of the Commission's findings were adequately supported by the evidence as a whole, and were thus conclusive (Pet. App. 28).

[6] Petitioners concede that CG&E would remain committed to this rate only until November 1, 1969 (Pet. 14).

its gas costs by a minimum of $2 million over a ten-year period as a result of buying at Texas Gas' lower rates. The record also showed that the lower cost of gas would permit three specific industrial sales which would raise Hamilton's load factor from 33 percent to an estimated 57 percent. As the Commission found, these factors would, in combination, reduce Hamilton's costs of purchased gas by at least 10 cents per Mcf. In addition, it was shown that the lower cost of the new supply of gas would enable Hamilton to attract new industry to an industrial park in the City. Hamilton, moreover, represented that the gas cost savings would be passed along in rate reductions (Pet. App. 55-56).

Petitioners no longer contest the sufficiency of the Commission's findings as to the existence or amount of the benefits to Hamilton and its customers; instead, they contend that the Commission failed to make a proper, relative evaluation of the likely harm to CG&E and its suppliers, and that an accurate evaluation would have revealed detriments to CG&E and its suppliers greater than the advantage to the City and its customers (Pet. 7-10). Petitioners assert that the Commission used one rule for Hamilton and another for CG&E (Pet. 7-8, 11-12) and that a so-called "revenue and expenses rule" should have been used to determine the detriment to CG&E and its suppliers as well as to determine the benefits to Hamilton. While the nature of this "rule", as well as the factual basis of the claim of a ten-year loss to CG&E of $2.4 million, is not completely clear (Pet. 12), petitioners seem to be insisting that in assessing the potential effects of

CG&E's loss of the Hamilton sale, the Commission should have ignored the facts showing (1) that it was an unprofitable sale, and (2) that growth from other customers would enable CG&E to make better utilization of existing facilities. *Supra*, pp. 3-4.[7]

Petitioners' objection (Pet. 8-9) to the Commission's reference to *Lynchburg Gas Co.* v. *Federal Power Commission*, 336 F. 2d 942 (C.A.D.C.), is misconceived. The Commission noted (Pet. App. 57) that in *Lynchburg* the court had held that it could not simply be assumed that the loss of a particular load would be injurious to a natural gas company or its customers, but rather the Commission must make the more meaningful inquiry whether the loss would actually operate to their substantial detriment.[8] This

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[7] In considering these factors, the Commission's calculations were based on CG&E's own figures, and all uncertainties in the predictions were resolved by giving CG&E the benefit of the doubt. Even so, the Commission found that the loss of Hamilton's business would result "in an actual savings by Cincinnati Gas of $155,000 annually." (Pet. App. 59.)

[8] In this respect, the court's *Lynchburg* decision represented merely an articulation of established Commission policy (see, *e.g.*, *Central Illinois Public Service Co.* v. *Panhandle Eastern Pipe Line Co.*, 4 FPC 1043, affirmed *sub nom. Kentucky Natural Gas Corporation* v. *Federal Power Commission*, 159 F. 2d 215 (C.A. 6); *Tennessee Gas Transmission Co.*, 14 FPC 544 and 635, affirmed *sub nom. Home Gas Co.* v. *Federal Power Commission*, 231 F. 2d 253 (C.A.D.C.), certiorari denied, 352 U.S. 831; *Shrewsbury Municipal Light Dept.* v. *New England Power Co.*, 32 FPC 373, affirmed *sub nom. New England Power Co.* v. *Federal Power Commission*, 349 F. 2d 258 (C.A. 1). Petitioners erroneously claim (Pet. 8) that *Shrewsbury* is inconsistent. There the Commission stated that the impact of Commission action on the existing supplier losing a load

is plainly a sound approach in certificate and rate cases alike. Of course, no single test of benefit or detriment can be followed mechanically, for the effect of a loss or gain of a load must necessarily be assessed in the particular context in which it arises. This is what the Commission, following its normal practice, did here in approving Hamilton's request to obtain gas from a new, substitute source.[9]

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had to be considered; the examiner's decision makes clear that the question of load replacement was canvassed, 32 FPC 373, 377, 396-397, just as it has been evaluated in this case, despite petitioners' protest (Pet. 15).

[9] Petitioners' assertion (Pet. 10-11) that the Commission has had a policy of protecting existing markets is inaccurate and certainly not supported by the two cases they cite. To be sure in both of those cases (*Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 219 F. 2d 729 (C.A. 3), certiorari denied, 349 U.S. 945, and *Home Gas Company* v. *Federal Power Commission*, 231 F. 2d 253 (C.A.D.C.), certiorari denied, 352 U.S. 831), the Commission's approval of a second supplier was not expected to displace existing supplies. Indeed, in *Panhandle*, the petition for review was dismissed for lack of aggrievement since Panhandle was seeking, in another proceeding, to reduce its own deliveries to the area involved. In *Home*, the Commission did limit the volumes to be sold by the new supplier, but the case (which cited with approval *Kentucky Natural, supra*, where, as here, the total substitution of a supplier had been authorized) did not reflect a policy of blindly protecting existing markets. Rather, it confirms that both the effect of loss of a sale on the supplier and the potential benefits to all the consumers affected are to be considered in each individual case.

In addition, petitioners italicize (Pet. 11) some language from the first *El Paso* case (*United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 660) in an attempt to suggest that competition is somehow more favored when its object is certification for incremental loads rather than for substitution for an existing supplier. Fuller analysis of that opinion, with

2. Petitioners make several subsidiary points which may be dealt with briefly. They complain (Pet. 13-15) that the court of appeals noted, as had the Commission, that there was doubt whether the Ohio Public Utility Commission had jurisdiction over the sale by CG&E to Hamilton. This issue has no bearing on the outcome of this case. Petitioners appear to concede that further litigation in the Ohio courts would be necessary to settle the point finally. But in any event the Commission decision does not rest on the eventual outcome of such a proceeding. At one time, CG&E urged that any certificate issued to Texas Gas and Hamilton should require that Hamilton obtain the Ohio Commission's approval of abandonment of the CG&E service (Pet. App. 65-66). The Commission properly rejected that suggestion, and petitioners are apparently not pressing it any longer. The question of state jurisdiction *vel non* bears only on the ability of Ohio to regulate the rates CG&E might demand after November 1, 1969 (the date beyond which the company is unwilling to guarantee that the rates proposed in its latest offer to Hamilton would not be increased). Since petitioners do not dispute that any

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even a cursory reading of the subsequent decision in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, makes clear that the Court was speaking of a frequently regrettable factual pattern and not endorsing discouragement of potential competition for existing markets. Indeed, the Court of Appeals for the Fourth Circuit has quite recently rejected a similar attempt to read that passage from *El Paso* as limiting competition to incremental sales. See *Atlantic Seaboard Corp.* v. *Federal Power Commission*, No. 11,404 (decided June 12, 1968).

change in these rates after November 1, 1969, would almost certainly be upward (Pet. 14), it is evident that the question of the Ohio Commission's jurisdiction has no significant bearing on the primary rationale of the Commission's decision—comparison of CG&E's offer with that of Texas Gas. If CG&E's rates were to increase because the latest rate offered to Hamilton was, as the Commission found, insufficient, the comparison would be even less favorable to CG&E.

Petitioners also argue (Pet. 15) that CG&E should be allowed to retain Hamilton in order that its "sales units would be increased and accordingly rates could be reduced." It is difficult to see how this could happen in view of the clear evidence, found adequate by the court below, that the Hamilton sale would result in an overall loss to CG&E. Besides, a concern with *general* rate reductions is difficult to reconcile with CG&E's often-expressed desire to allocate separately to Hamilton any large quantities of low-priced gas which it may acquire.

Petitioners deal briefly with the question of whether CG&E is a "middleman." They assert that middlemen are "a necessity—even where the 'factory' is close at hand, as in the case of Hamilton in its proximity to Texas Gas." (Pet. 16.) While intermediate gas pipelines perform valuable economic functions in some situations, the Commission's elimination of intermediaries where practicable has received consistent judicial approval. See *Kentucky Natural Gas Corp.* v. *Federal Power Commission, supra; New England Power Co.* v. *Federal Power Commission,* 349 F. 2d

258 (C.A. 1). Such a result is particularly sound when, as here, substantial economies are achieved with minimal detriment, if any, to the middleman or his suppliers or customers.

Finally, petitioners refer to the alleged impact of the Commission's decision on CG&E's suppliers, Ohio Fuel and Kentucky Gas Transmission. The Commission, however, found as a fact that the actual impact on them would be minimal and that the loss of volume would be quickly recouped (see Pet. App. 40-41). As the court of appeals noted, this finding, which largely follows from the findings as to CG&E's continued load growth, was fully supported (Pet. App. 28).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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